BRB No. 00-1077 BLA

MARCUS OSBORNE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WHITAKER COAL COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
SUN COAL COMPANY	)	
	)	
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.

Edmond Collett, Hyden, Kentucky, for claimant.

Ronald E. Gilbertson (Bell, Boyd & Lloyd PLLC), Washington, D.C., for employer.

Edward Waldman (Howard M. Radzely, 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: SMITH and DOLDER, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.
PER CURIAM:

Claimant appeals the Decision and Order (00-BLA-0135) of Administrative Law Judge Thomas F. Phalen, Jr. (the administrative law judge) denying benefits in 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] The administrative law judge credited claimant with twenty-three years of coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718.[2] The administrative law judge found the newly submitted evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) (2000). Consequently, the administrative law judge found the evidence insufficient to establish a change in conditions pursuant to 20 C.F.R. §725.310 (2000).[3] The administrative law judge also found the evidence insufficient to establish a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000).[4]

[1]Claimant filed a claim on December 6, 1995. Director's Exhibit 1. On September 3, 1997, Administrative Law Judge Alfred Lindeman issued a Decision and Order denying benefits, Director's Exhibit 38, which the Board affirmed, *Osborne v. Whitaker Coal Corp.*, BRB No. 97-1760 BLA (Sept. 11, 1998)(unpub.). Judge Lindeman's denial was based on claimant's failure to establish the existence of pneumoconiosis. Director's Exhibit 38. Claimant filed a request for modification on October 8, 1998. Director's Exhibit 46.

[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). All citations to the regulations, unless otherwise noted, refer 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). The Board subsequently issued an order requesting supplemental briefing in the instant case. 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*, Civ. No. 00-3086 (D.D.C. Aug. 9, 2001). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

[3]The revisions to the regulation at 20 C.F.R. §725.310 apply only to claims filed after January 19, 2001.

[4]While the administrative law judge found the evidence sufficient to establish total

Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's finding that the x-ray evidence is insufficient to establish the existence of pneumoconiosis. Claimant also challenges the administrative law judge's finding that the medical opinion evidence is insufficient to establish the existence of pneumoconiosis. Employer responds to claimant's appeal, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.[5]

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).

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disability based on all of the evidence of record, he found the evidence insufficient to establish the existence of pneumoconiosis based on all of the evidence of record.

[5]Inasmuch as the administrative law judge's length of coal mine employment finding, and his findings at 20 C.F.R. §§718.202(a)(2), (a)(3) and 718.204(c) (2000) are not challenged on appeal, we affirm these findings. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); 20 C.F.R. §§718.202(a)(2), (a)(3) and 718.204(c).

First, we address claimant's contention that the administrative law judge erred in his weighing of the conflicting x-ray evidence and medical opinion evidence with respect to the administrative law judge's change in conditions finding. Initially, claimant contends that the administrative law judge erred in finding the newly submitted evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) (2000). Of the two newly submitted interpretations of an x-ray dated August 24, 1998, one reading is positive for pneumoconiosis, Director's Exhibit 52, and one reading is negative, Director's Exhibit 53. The administrative law judge properly accorded greater weight to the negative x-ray reading which was provided by a physician who is dually qualified as a B-reader and a Board-certified radiologist.[6] *See Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). Thus, we reject claimant's assertion that the administrative law judge erred in weighing the newly submitted x-ray evidence. Inasmuch as it is supported by substantial evidence, we affirm the administrative law judge's finding that the newly submitted x-ray evidence is insufficient to establish the existence of pneumoconiosis. *See* 20 C.F.R. §718.202(a)(1).

Claimant also contends that the administrative law judge erred in finding the newly submitted evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4) (2000). The administrative law judge considered the newly submitted reports of Dr. Varghese. In a report dated September 28, 1998, Dr. Varghese diagnosed chronic obstructive pulmonary disease, but did not indicate that this condition was related to coal dust exposure. Director's Exhibit 45. In a subsequent report dated October 9, 1998, Dr. Varghese diagnosed chronic obstructive pulmonary disease related to coal dust exposure. Director's Exhibit 52. The administrative law judge permissibly discredited the October 9, 1998 opinion of Drs. Varghese because Dr. Varghese's diagnosis of pneumoconiosis was based in part on a positive interpretation of an x-ray that was subsequently reread as negative by a physician with superior qualifications.[7] *Winters v. Director, OWCP*, 6 BLR 1-877, 881 n.4 (1984). In addition, the administrative law judge permissibly discredited Dr. Varghese's October 9, 1998 opinion because he found it to be based on an inaccurate smoking history.[8]

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[6]Whereas Dr. Varghese, who is not a B-reader or a Board-certified radiologist, read the August 24, 1998 x-ray as positive for pneumoconiosis, Director's Exhibit 52, Dr. Sargent, who is a B-reader and a Board-certified radiologist, read the same x-ray as negative, Director's Exhibit 53.

[7]The administrative law judge stated that "[t]he August 24, 1998 x-ray which Dr. Varghese interpreted as positive for pneumoconiosis was interpreted as negative by Dr. Sargent, a dually qualified physician." Decision and Order at 13. The administrative law judge additionally stated that "Dr. Varghese has no special radiological qualifications." *Id*.

[8]The administrative law judge stated that "[Dr. Varghese] noted...a four pack year

See Maypray v. Island Creek Coal Co., 7 BLR 1-683 (1985).

The administrative law judge also discredited the October 9, 1998 opinion of Dr. Varghese because he found it to be based on an inaccurate coal mine employment history. *See Addison v. Director, OWCP*, 11 BLR 1-68 (1988). The administrative law judge stated that "[Dr. Varghese] noted a twenty-seven year coal mine employment history." Decision and Order at 13. The administrative law judge also stated, "I have found that the [c]laimant worked for twenty-three years in the mines." *Id*. Further, the administrative law judge discredited Dr. Varghese's opinion because "[t]he pulmonary function relied on by Dr. Varghese in his October 9, 1998 report was found [to be] invalid by Dr. Burki due to suboptimal effort." Decision and Order at 13. However, the administrative law judge did not provide an explanation for according greater weight to Dr. Burki, a consulting physician, than to Dr. Varghese, the physician who administered the study. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Siegel v. Director, OWCP*, 8 BLR 1-156 (1985)(2-1 opinion with Brown, J., dissenting). Nonetheless, inasmuch as the administrative law judge has provided valid alternative bases for discrediting Dr. Varghese's October 9, 1998 opinion, *see Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378 (1983), we hold that any error in the administrative law judge's consideration of Dr. Varghese's opinion is harmless, *see Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

In view of our affirmance of the administrative law judge's finding that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis, *see* 20 C.F.R. §718.202(a), we affirm the administrative law judge's finding that the evidence is insufficient to establish a change in conditions at 20 C.F.R. §725.310 (2000). *See Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-8 (1994); *Napier v. Director, OWCP*, 17 BLR 1-111 (1993); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993).

Next, we address claimant's contention that the administrative law judge erred in his weighing of the conflicting x-ray evidence and medical opinion evidence with respect to his mistake in a determination of fact finding. Claimant contends that the administrative law judge erred in finding the evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) and (a)(4) (2000). The evidence submitted prior to claimant's request for modification was originally considered by Administrative Law Judge Alfred

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smoking history." Decision and Order at 13. The administrative law judge also stated, "I have found that the [c]laimant...smoked for eighteen to twenty years at the rate of approximately one pack per day." *Id*.

Lindeman. In a Decision and Order dated September 3, 1997, Judge Lindeman found the evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) and (a)(4) (2000). Director's Exhibit 38. In response to claimant's appeal, the Board affirmed Judge Lindeman's findings at 20 C.F.R. §718.202(a)(1) and (a)(4) (2000). *Osborne v. Whitaker Coal Corp.*, BRB No. 97-1760 BLA (Sept. 11, 1998)(unpub.). With regard to the issue of pneumoconiosis at 20 C.F.R. §718.202(a)(1) and (a)(4) (2000), the administrative law judge considered the evidence submitted both prior to and subsequent to claimant's request for modification. In view of the Board's prior affirmance of Judge Lindeman's finding that pneumoconiosis is not established based on the previously submitted x-ray and medical opinion evidence, and given our current affirmance of the administrative law judge's finding that pneumoconiosis is not established based on the newly submitted x-ray and medical opinion evidence, we hold that substantial evidence supports the administrative law judge's finding that pneumoconiosis is not established based on all of the x-ray and medical opinion evidence of record. *See* 20 C.F.R. §718.202(a)(1) and (a)(4). Moreover, inasmuch as substantial evidence supports the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis based on all of the evidence of record, *see* 20 C.F.R. §718.202(a), we affirm the administrative law judge's finding that the evidence is insufficient to establish a mistake in a determination of fact at 20 C.F.R. §725.310 (2000). *See Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge