BRB No. 05-0168 BLA

HAROLD K. SULLIVAN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 08/25/2005
	)	
PEABODY COAL COMPANY	)	
	)	
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 - Denying Request for Modification of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Joseph Kelley (Monhollon & Kelley), Madisonville, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order - Denying Request for Modification (03-BLA-0117) of Administrative Law Judge Thomas F. Phalen, Jr., 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). The administrative law judge credited claimant with twenty-one years of coal mine employment and noted that the

claim before him was a request for modification under 20 C.F.R. §725.310 (2000).[1] Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718 and determined that the newly submitted evidence was insufficient to establish either the existence of pneumoconiosis or total respiratory disability due to pneumoconiosis. The administrative law judge also found that the prior denial of benefits did not contain a mistake in a determination of fact. The administrative law judge determined that the prerequisites for modification were not established and denied benefits accordingly.

On appeal, claimant contends that the administrative law judge did not properly weigh the evidence relevant to 20 C.F.R. §§718.202(a)(1) and 718.204(c). Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate in this appeal.[2]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Pursuant to Section 718.202(a)(4), the administrative law judge considered the newly submitted medical opinions relevant to the existence of pneumoconiosis. Claimant submitted medical opinions in which Drs. Houser and Givens diagnosed legal and clinical pneumoconiosis. Claimant's Exhibits 1, 2; Employer's Exhibits 5, 6. Employer

[1] Claimant filed his initial claim for benefits on March 15, 2000. Director's Exhibit 1. This claim was denied by Administrative Law Judge Donald W. Mosser in a Decision and Order issued on June 22, 2001. Judge Mosser accepted employer's stipulation that claimant is totally disabled, but found that claimant failed to establish the existence of pneumoconiosis and total disability due to pneumoconiosis. Director's Exhibit 49. The Board affirmed the denial of benefits in a Decision and Order dated May 10, 2002. *Sullivan v. Peabody Coal Co.*, BRB No. 01-0813 BLA (May 10, 2002)(unpub.); Director's Exhibit 58. Claimant filed a request for modification on February 21, 2003.

[2] We affirm the administrative law judge's decision to credit claimant with twenty-one years of coal mine employment, his findings that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3), and that the prior denial of benefits does not contain a mistake in a determination of fact, as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

submitted opinions in which Dr. O'Bryan ruled out the existence of pneumoconiosis and Dr. Branscomb ruled out any connection between pneumoconiosis and claimant's total respiratory disability. Employer's Exhibits 2, 3. The administrative law judge found that none of the newly submitted medical opinions was well-reasoned or well-documented. He determined, therefore, that claimant had failed to prove the existence of pneumoconiosis. Decision and Order at 12-13.

Claimant argues that the administrative law judge erred in discrediting the medical opinions of Drs. Houser and Givens. With respect to Dr. Houser's opinion, claimant maintains that Dr. Houser unequivocally opined that claimant's respiratory condition is attributable to coal dust exposure and that the administrative law judge should have taken judicial notice of Dr. Houser's status as a Board-certified pulmonologist.

These contentions are without merit. Regarding Dr. Houser's qualifications, it was claimant's responsibility to obtain and submit evidence relevant to this issue. Although the administrative law judge could have taken judicial notice of Dr. Houser's qualifications, as claimant now urges, he was not required to do so. *Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990); *Onderko v. Director, OWCP*, 14 BLR 1-2 (1989). In addition, the administrative law judge acted within his discretion as fact-finder in determining that Dr. Houser's opinion was "entitled to little probative weight," as the doctor relied upon various statistical probabilities reported in the medical literature rather than "actual medical findings" to diagnose pneumoconiosis. Decision and Order at 12; Claimant's Exhibit 1; Employer's Exhibit 5 at 38-40; *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-123 (6th Cir. 2000)[3]; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

With respect to Dr. Givens's opinion, the administrative acknowledged that Dr. Givens is claimant's treating physician but accorded his diagnosis of pneumoconiosis little weight because the administrative law judge determined that the doctor did not adequately identify the bases for his conclusions and possessed no special qualifications. Decision and Order at 13; Claimant's Exhibit 2; Employer's Exhibit 6. Claimant asserts that the administrative law judge mischaracterized Dr. Givens's opinion, as Dr. Givens documented his diagnoses by referring to claimant's symptoms, his weight, his occupational and smoking histories, and a pulmonary function study.

Claimant's allegation of error is without merit. The administrative law judge acted within his discretion as fact-finder in determining that Dr. Givens's opinion was of

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

"little probative value," despite his status as a treating physician, on the ground that Dr. Givens did not identify the evidence which supported his diagnoses of coal dust related lung conditions. Decision and Order at 13; *Eastover Mining Co. v. Williams*, 338 F.3d 501, 514, 22 BLR 2-625, 2-648-49 (6th Cir. 2003); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 22 BLR 2-495 (6th Cir. 2002). The pulmonary function study to which claimant refers was obtained by Dr. O'Bryan, one of employer's experts, and Dr. Givens merely indicated that the results suggested that claimant's obstructive lung disease possessed an asthmatic component. Employer's Exhibit 6 at 13.

Because claimant's arguments regarding the administrative law judge's weighing of the opinions of Drs. Houser and Givens under Section 718.202(a)(4) are without merit, we affirm the administrative law judge's determination that the newly submitted medical opinion evidence does not support a finding of pneumoconiosis or a change in conditions. We also affirm the administrative law judge's determination that the newly submitted evidence is insufficient to establish total disability due to pneumoconiosis at Section 718.204(c) or a change in conditions. In addressing the evidence relevant to Section 718.204(c), the administrative law judge relied upon the permissible findings that he made with respect to the probative value of the opinions in which Drs. Houser and Givens attributed claimant's respiratory condition to coal dust exposure. Decision and Order at 14; *Cornett*, 227 F.3d 569, 576, 22 BLR 2-107, 2-123; *Anderson.*, 12 BLR 1-111, 1-113.

We affirm, therefore, the administrative law judge's determination that the prior denial contains no mistake in a determination of fact pursuant to Section 725.310 (2000) and his finding that claimant has not established a change in conditions, as it is rational and supported by substantial evidence. Thus, we must also affirm the denial of benefits. 20 C.F.R. §725.310 (2000); *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994); *Kott v. Director, OWCP*, 17 BLR 1-9 (1992); *Motichak v. Beth Energy Mines, Inc*, 17 BLR 1-14 (1992).

Accordingly, the administrative law judge's Decision and Order - Denying Request for Modification is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge