BRB No. 06-0293 BLA

M.C. SMITH	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NEW WHITE COAL COMPANY	)	
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE GROUP	)	DATE ISSUED: 08/30/2006
	)	
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 on Remand of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

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

Francesca L. Maggard (Lewis and Lewis Law Office), Hazard, Kentucky, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand (03-BLA-0204) of Administrative Law Judge Joseph E. Kane denying benefits on modification of a miner's duplicate 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 is before the Board for the second time. Initially, the administrative law judge issued an Order Granting Summary Judgment because he found that there was "no material issue of fact." Order Granting Summary Judgment at 2. The administrative law judge found that because the only evidence claimant submitted with his request for modification predated his present claim and addressed his mental, not his physical, health, it could not demonstrate a change in conditions pursuant to 20 C.F.R. §725.310 (2000).[2] Accordingly, the administrative law judge granted summary judgment and dismissed the claim.

The procedural history of this case was set out in the Board's January 1, 2005 Decision and Order. *Smith v. New White Coal Company*, BRB No. 04-0369 BLA (Jan. 12, 2005)(unpub.). In that Decision and Order, in response to claimant's appeal, the Board vacated the administrative law judge's Order Granting Summary Judgment and remanded the case for further consideration. Specifically, the Board affirmed the administrative law judge's finding that the evidence claimant submitted with his request for modification was irrelevant to the issue of the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and, therefore, that it was insufficient to demonstrate a change in conditions pursuant to 20 C.F.R. §725.310 (2000). *Id.* Nonetheless, the Board vacated the administrative law judge's Order Granting Summary Judgment because the administrative law judge did not review the entire evidentiary record to determine whether a mistake in a determination of fact was made in the prior denial. *Id.*

On remand, the administrative law judge admitted the March 3, 2005 report of Dr. Mahboob as Claimant's Exhibit 1. Notwithstanding the Board's previous affirmance of the administrative law judge's finding that claimant failed to demonstrate a change in conditions pursuant to Section 725.310 (2000), the administrative law judge reconsidered the issue of a change in conditions because of his admittance of Dr. Mahboob's report on remand. The administrative law judge considered the entire evidentiary record and found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and total respiratory disability pursuant to 20 C.F.R. §718.204(b).

[1]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 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2]Although the Department of Labor has made substantive revisions to 20 C.F.R. §725.310 in the amended regulations, these revisions only apply to claims filed after January 19, 2001.

Therefore, the administrative law judge found that claimant failed to demonstrate a change in conditions or a mistake in a determination of fact pursuant to Section 725.310 (2000). Accordingly, the administrative law judge denied benefits.

In the present appeal, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) and (a)(4). Claimant's Brief at 3-5. Additionally, claimant contends that the administrative law judge erred in failing to find total disability pursuant to Section 718.204(b)(2)(iv). *Id.* at 5-6. Employer/carrier 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 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)(1), claimant contends that the administrative law judge erred in finding the x-ray evidence insufficient to establish the existence of pneumoconiosis. The administrative law judge noted that all of the x-ray reports of record are negative for the existence of pneumoconiosis. Therefore, the administrative law judge found no mistake in fact in Judge Roketenetz's determination that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). Claimant's contentions, that the administrative law judge erred in weighing the x-ray evidence by relying "almost solely on the qualifications of the physicians" and in placing

[3]We affirm the administrative law judge's findings that claimant failed to demonstrate a mistake in a determination of fact pursuant to 20 C.F.R. §§718.202(a)(2)-(3), 718.204(b)(2)(i)-(iii), as these findings are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Additionally, we affirm, as unchallenged, the administrative law judge's finding that claimant failed to demonstrate a change in conditions pursuant to Section 725.310 (2000), based on Dr. Mahboob's March 3, 2005 report. *Id.*

On appeal, employer/carrier objects to the administrative law judge's admission of Dr. Mahboob's March 3, 2005 report as Claimant's Exhibit 1. As the administrative law judge properly found Dr. Mahboob's report is not supportive of claimant's burden to establish a change in conditions at either Section 718.202(a) or Section 718.204(b), we deem harmless, *see Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984), any error the administrative law judge may have made in admitting this physician's report.

substantial weight on the numerical superiority of the x-ray readings, are without merit. Claimant's Brief at 3-4. Because all of the x-ray evidence of record is negative for the presence of pneumoconiosis, there was no need for the administrative law judge to weigh conflicting x-ray readings. Accordingly, we affirm the administrative law judge's finding that there was no mistake in fact in Judge Roketenetz's Section 718.202(a)(1) finding, as it is supported by substantial evidence. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); *Johnson v. Island Creek Coal Co.*, 846 F.2d 364, 11 BLR 2-161 (6th Cir. 1988); *Creech v. Benefits Review Board*, 841 F.2d 706, 11 BLR 2-86 (6th Cir. 1988).

Pursuant to Section 718.202(a)(4), the administrative law judge noted that Judge Roketenetz found that the medical opinion evidence was insufficient to establish the existence of pneumoconiosis, and that his finding was affirmed by the Board. The administrative law judge further noted that Judge Roketenetz found that Dr. Baker's report "was equivocal at best and based on a significantly greater history of years of coal mine employment than established by the evidence" and found that Dr. Dahhan's contrary report was well reasoned and well documented.[4] Decision and Order on Remand at 3. The administrative law judge stated that he "reviewed the medical opinion reports and [found] no mistake in determination of fact in Judge Roketenetz's characterization of the medical opinion reports." *Id.* Specifically, the administrative law judge found that Dr. Baker's opinion was equivocal because this physician "concluded in one part of his report that the chronic bronchitis and mild restrictive defect present were due to coal mine dust exposure and in another part of his report he stated Claimant did not have an occupationally acquired lung disease." *Id.* Additionally, the administrative law judge noted that Dr. Dahhan's finding of no evidence of pneumoconiosis is based on physical examination findings, a chest x-ray, and pulmonary function and blood gas studies. Therefore, the administrative law judge stated that he "agree[d] with Judge Roketenetz's assessment that Dr. Dahhan's report is well reasoned and well documented." *Id.*

Claimant asserts that the administrative law judge erred in rejecting the October 29, 1998 opinion of Dr. Baker regarding the existence of pneumoconiosis. Specifically, claimant contends that "an ALJ may not discredit the opinion of a physician whose report

[4]In his October 29, 1998 report, Dr. Baker diagnosed chronic bronchitis and mild restrictive defect due to cigarette smoking and coal dust exposure and noted, in another part of his report, that claimant does not have an occupational lung disease caused by his coal mine employment. Director's Exhibit 9. In his December 11, 1998 report, Dr. Dahhan found that there is no evidence that claimant has occupational pneumoconiosis. Director's Exhibit 10.

is based on a positive x-ray interpretation which is contrary to the ALJ's findings." Claimant's Brief at 4. Contrary to claimant's assertion, the administrative law judge did not reject Dr. Baker's report because it is based on a positive x-ray interpretation[5] which was contrary to his finding that the x-ray evidence was negative. Rather, the administrative law judge found no mistake in fact in Judge Roketenetz's determination that Dr. Baker's opinion was equivocal. Accordingly, we reject claimant's assertions[6] and affirm the administrative law judge's finding that there was no mistake in fact made in Judge Roketenetz's consideration of the medical opinion evidence pursuant to Section 718.202(a)(4). *See Church v. Eastern Assoc. Coal Corp.*, 21 BLR 1-51, 1-56 (1997), *rev'g in part and aff'g in part on recon.*, 20 BLR 1-8 (1996); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985).

Pursuant to Section 718.204(b)(2)(iv), the administrative law judge stated that Judge Roketenetz noted that "neither Dr. Baker nor Dr. Dahhan concluded Claimant was unable to perform his usual coal mine employment due to his respiratory or pulmonary condition." Decision and Order on Remand at 5. The administrative law judge found no mistake in fact in Judge Roketenetz's finding that claimant failed to establish total respiratory disability pursuant to Section 718.204(b)(2)(iv) because "none of the physicians concluded that Claimant was unable to perform his usual coal mine employment . . . ." *Id.* Claimant asserts that the administrative law judge erred in failing to compare the exertional requirements of claimant's usual coal mine employment, as a truck driver, to Dr. Baker's finding of a "moderate breathing impairment," to find total respiratory disability established. Claimant's Brief at 6. In fact, in his 1998 report, Dr. Baker opined that claimant has a *mild* impairment and that he retains the respiratory capacity to perform his usual coal mine employment. Director's Exhibit 9. Dr. Dahhan also found that claimant retains the respiratory capacity to perform his usual coal mine employment.[7] Director's Exhibit 10. Contrary to claimant's assertion, because the

[5]In fact, Dr. Baker interpreted the x-ray taken in connection with his examination as negative for the existence of pneumoconiosis. Director's Exhibit 9.

[6]Additionally, claimant asserts that the administrative law judge erred in interpreting medical tests and in substituting his conclusions for those of the physician. Claimant's Brief at 5. However, claimant has not provided any support for that assertion, nor does a review of the evidence and the administrative law judge's Decision and Order reveal that the administrative law judge interpreted medical tests or substituted his conclusions for those of the physicians of record.

[7]In accordance with *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000), the record reflects that Drs. Baker and Dahhan had knowledge of

administrative law judge rationally found that claimant failed to establish total respiratory disability based on the opinions of Drs. Baker and Dahhan, he also properly determined that there was no mistake in fact made by Judge Roketenetz pursuant to Section 718.204(b)(2)(iv).[8] *See Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); *Calfee v. Director, OWCP*, 8 BLR 1-7, 1-10 (1985). Therefore, we affirm the administrative law judge's finding that claimant failed to demonstrate a mistake in fact pursuant to Section 718.204(b)(2)(iv), as it is supported by substantial evidence. *See Ondecko*, 512 U.S. at 280, 18 BLR at 2A-12; *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984).

Based on the foregoing, we affirm the administrative law judge's finding that no mistake in fact has been made in the assessment of the evidence at Sections 718.202(a)(1)-(4) and 718.204(b)(2)(i)-(iv). *See Mills v. Director, OWCP*, 348 F.3d 133, 23 BLR 2-12 (6th Cir. 2003); *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994). Therefore, we also affirm the administrative law judge's denial of modification pursuant to Section 725.310 (2000).

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claimant's usual coal mine employment as a truck driver. Specifically, Drs. Baker and Dahhan referenced claimant's usual coal mine work as a truck driver in their reports. Director's Exhibits 9, 10.

[8]We reject claimant's assertion that the administrative law judge erred in not finding him totally disabled in light of the progressive and irreversible nature of pneumoconiosis. 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).

Accordingly, the administrative law judge's Decision and Order on Remand 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