BRB No. 12-0566 BLA

SAMUEL KURKO, SR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DONALDSON MINING COMPANY	)	DATE ISSUED: 08/15/2013
	)	
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 Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith, Parkersburg, West Virginia, for claimant.

Christopher M. Green (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

Before: SMITH, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2011-BLA-5596) of Administrative Law Judge Richard A. Morgan (the administrative law judge) rendered on a request for modification of a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011)(the Act).[1] The

[1] The pertinent procedural history of this case is as follows: Claimant filed his claim for benefits on November 7, 2006. Director's Exhibit 2. On February 20, 2009, Administrative Law Judge Richard A. Morgan (the administrative law judge) issued a Decision and Order denying benefits. The administrative law judge's denial was based on claimant's failure to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and a totally disabling respiratory impairment due to pneumoconiosis

administrative law judge credited claimant with "fewer than fifteen years" of qualifying coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Parts 718 and 725. The administrative law judge 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). Further, the administrative law judge found that total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c) was not established. In addition, the administrative law judge found that the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), was not applicable to this case. The administrative law judge therefore found that claimant failed to establish a basis for modification by demonstrating either a change in conditions or 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 findings that he failed to establish the existence of pneumoconiosis at Section 718.202(a), and that he failed to establish total respiratory disability at Section 718.204(b). Claimant also contends that the administrative law judge erred in failing to find that he established total disability due to pneumoconiosis at Section 718.204(c). 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.[2]

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,[3] they are binding upon this Board and

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pursuant to 20 C.F.R. §718.204(b) and (c). Director's Exhibit 57. In response to claimant's appeal, the Board affirmed the administrative law judge's denial of benefits, based on claimant's failure to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a). *Kurko v. Donaldson Mine Co.*, BRB No. 09-0431 BLA (Jan. 29, 2010) (unpub.); Director's Exhibit 67. Claimant subsequently filed a request for modification on April 13, 2010. Director's Exhibit 68.

[2] We affirm the administrative law judge's findings that claimant worked in qualifying coal mine employment for "fewer than fifteen years" and that the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), was not applicable to this case as these findings are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order [on Modification] at 3-4, 13.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because claimant's coal mine employment occurred in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit

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).

Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §922, which is incorporated into the Act by 30 U.S.C. §932(a), and implemented by 20 C.F.R. §725.310, authorizes modification of an award or denial of benefits, based on a change in conditions or a mistake in a determination of fact. In considering whether a change in conditions has been established, an administrative law judge is obligated to perform an independent assessment of the newly submitted evidence, 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 that defeated entitlement in the prior decision. *See 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). Mistakes of fact may be demonstrated by wholly new evidence, cumulative evidence, or merely upon further reflection on the evidence of record. *See O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971); *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993)*; King v. Jericol Mining, Inc.*, 246 F.3d 822, 22 BLR 2-305 (6th Cir. 2001).

Claimant contends that the administrative law judge erred in finding that he failed to establish the existence of pneumoconiosis at Section 718.202(a) because, claimant alleges, the administrative law judge misapplied the standard for weighing medical evidence set forth in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). We disagree. In addressing the issue of pneumoconiosis at Section 718.202(a)(1)-(4), the administrative law judge considered both the old and new evidence of record. At Section 718.202(a)(1), the administrative law judge considered x-rays dated January 24, 2007, May 30, 2007, September 25, 2008, and March 5, 2010. The administrative law judge reasonably found that the January 24, 2007 x-ray was negative for pneumoconiosis, based on Dr. Myer's superior qualifications and expertise.[4] *See Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). Further, the administrative law judge reasonably found that the May 30, 2007 and September 25, 2008 x-rays were in equipoise.[5] *See Director, OWCP v. Greenwich Collieries*

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[4] Dr. Rasmussen, a B reader, read the January 24, 2007 x-ray as positive for pneumoconiosis, while Dr. Meyer, a Board-certified radiologist and B reader, read this x-ray as negative.

[5] Dr. Ahmed, a dually-qualified radiologist, read the May 30, 2007 x-ray as positive for pneumoconiosis, while Drs. Zaldivar and Wiot, who are also dually-qualified

[*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994). Lastly, the administrative law judge reasonably found that the March 5, 2010 x-ray was negative for pneumoconiosis, based on Dr. Wheeler's superior qualifications and expertise,[6] *see Worhach*, 17 BLR at 1-108; *Dixon*, 8 BLR at 1-345; *Roberts*, 8 BLR at 1-213, and Dr. Scott's corroborating reading, *see Walker v. Director, OWCP*, 927 F.2d 181, 15 BLR 2-16 (4th Cir. 1991); *Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984); *Newland v. Consolidation Coal Co.*, 6 BLR 1-1286 (1984). Hence, the administrative law judge reasonably found that claimant failed to establish the existence of pneumoconiosis at Section 718.202(a)(1).

In addition, the administrative law judge reasonably found that claimant failed to establish the existence of pneumoconiosis at Section 718.202(a)(2) because there is no biopsy evidence in the record. 20 C.F.R. §718.202(a)(2). Further, the administrative law judge reasonably found that claimant failed to establish the existence of pneumoconiosis at Section 718.202(a)(3) because there is no evidence of complicated pneumoconiosis in this living miner's claim that was filed after January 1, 1982. 20 C.F.R. §§718.202(a)(3), 718.304, 718.305, 718.306.

At Section 718.202(a)(4), the administrative law judge considered the opinions of Drs. Zaldivar, Hippensteel, Rosenberg, and Rasmussen. While Dr. Rasmussen diagnosed "coal workers' pneumoconiosis," Director's Exhibit 9, Drs. Zaldivar, Hippensteel, and Rosenberg opined that claimant does not have "medical" pneumoconiosis. Director's Exhibits 29, 34, 50, 51, 53; Employer's Exhibits 3, 4. The administrative law judge permissibly gave less weight to Dr. Rasmussen's opinion because the doctor's diagnosis of clinical pneumoconiosis[7] was based, in part, on a positive x-ray interpretation that was

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radiologists, read this x-ray as negative. Similarly, Dr. Ahmed read the September 25, 2008 x-ray as positive for pneumoconiosis, while Dr. Wiot read this x-ray as negative.

[6] While Dr. Ahmed, a dually-qualified radiologist, read the March 5, 2010 x-ray as positive for pneumoconiosis, Drs. Wheeler and Scott, who are also dually-qualified radiologists, read this x-ray as negative. The administrative law judge permissibly accorded minimal weight to Dr. Ahmed's finding of pneumoconiosis in the lower lung fields because Dr. Ahmed failed to properly classify his findings in accordance with the ILO classification system. 20 C.F.R. §718.102(b); *see Wilt v. Wolverine Mining Co.*, 14 BLR 1-70 (1990); *Casey v. Director, OWCP*, 7 BLR 1-873, 1-876 (1985).

[7] Clinical pneumoconiosis is defined as "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1). Legal pneumoconiosis "includes any chronic

reread as negative for clinical pneumoconiosis by a physician who possessed superior qualifications. *See Furgerson v. Jericol Mining Inc.*, 22 BLR 1-216, 1-226 (2002) (en banc); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 (1993); *Winters v. Director, OWCP*, 6 BLR 1-877, 1-881 n.4 (1984). Therefore, the administrative law judge properly found that claimant failed to establish the existence of clinical pneumoconiosis at Section 718.202(a)(4). Further, the administrative law judge reasonably found that none of the physicians diagnosed legal pneumoconiosis. Director's Exhibits 9, 29, 34, 50, 51, 53; Employer's Exhibits 3, 4. In so finding, the administrative law judge concluded that Dr. Rasmussen's opinion that claimant's coal mine dust exposure contributed at least minimally to his disabling lung disease is insufficient to support a finding of legal pneumoconiosis, "because [20 C.F.R. §718.201(b)] defines the 'arising out of coal mine employment' language of the definition of legal pneumoconiosis as including 'any chronic pulmonary disease or respiratory or pulmonary impairment *significantly* related to, or *substantially* aggravated by, dust exposure in coal mine employment." Decision and Order [on Modification] at 17. Thus, the administrative law judge permissibly found that claimant failed to establish the existence of legal pneumoconiosis at Section 718.202(a)(4). The administrative law judge further stated, "[w]eighing the evidence together, I find the claimant has not met his burden of proof in establishing the existence of pneumoconiosis." *Id*.

In *Compton*, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, held that, although Section 718.202(a) enumerates four distinct methods of establishing pneumoconiosis, all types of relevant evidence must be weighed together to determine whether a miner suffers from pneumoconiosis. *Compton*, 211 F.3d at 211, 22 BLR at 2-174; *see also Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997). In this case, the administrative law judge properly weighed all the evidence together at Section 718.202(a)(1)-(4) in accordance with *Compton*. Thus, we reject claimant's assertion that the administrative law judge misapplied the standard for weighing medical evidence at Section 718.202(a).

Because it is supported by substantial evidence, we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis at Section 718.202(a). *See Compton*, 211 F.3d at 211, 22 BLR at 2-174; *Ondecko*, 512 U.S. at 281, 18 BLR at 2A-12.

Claimant next contends that the administrative law judge erred in finding that he failed to establish total respiratory disability at Section 718.204(b). In addressing the

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lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). This definition encompasses any chronic respiratory or pulmonary disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

issue of total respiratory disability at Section 718.204(b), the administrative law judge considered both the old and new evidence of record. The administrative law judge initially noted that Section 718.204(b)(2)(iii) was inapplicable because the record contained no evidence of cor pulmonale with right-sided congestive heart failure. At Section 718.204(b)(2)(i), the administrative law judge noted that there was no newly submitted pulmonary function study evidence and that all of the previously submitted pulmonary function studies yielded non-qualifying values.[8] At Section 718.204(b)(2)(ii), the administrative law judge noted that "[n]o new [blood gas studies] were submitted on modification." Decision and Order [on Modification] at 19. In considering the previously submitted arterial blood gas studies, the administrative law judge noted that, while the exercise portion of the January 24, 2007 study yielded qualifying results, the resting portion of this study yielded non-qualifying values. Director's Exhibit 9. Further, the administrative law judge noted that the resting portion of the May 30, 2007 study yielded non-qualifying values. Employer's Exhibit 1. At Section 718.204(b)(2)(iv), the administrative law judge considered the medical opinion evidence. The record contains the opinions of Drs. Zaldivar, Hippensteel, Rosenberg, and Rasmussen. The administrative law judge correctly stated that "[o]nly Dr. Rasmussen opined that [claimant] was actually disabled."[9] Decision and Order [on Modification] at 20. The administrative law judge additionally stated that "[i]t bears noting that the opinions of Drs. Zaldivar and Hippensteel, to which I have given more weight, determined that the "qualifying" value found in Dr. Rasmussen's exercise [arterial blood gas study] was unreliable due to [claimant's] hyperventilation." *Id*. Based on his weighing of all the relevant evidence together, the administrative law judge found that claimant failed to establish total respiratory disability at Section 718.204(b).

Claimant asserts that the administrative law judge relied on an improper standard of counting the number of arterial blood gas study results to resolve the issue in favor of

[8] A "qualifying" pulmonary function study or arterial blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B and C. A "non-qualifying" pulmonary function study or arterial blood gas study yields values that exceed those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

[9] Dr. Zaldivar opined that claimant is fully capable from a pulmonary standpoint of performing his usual coal mine work. Director's Exhibits 29, 50, 53. Dr. Hippensteel opined that claimant does not have a permanent pulmonary impairment from any cause. Director's Exhibits 34, 51. Dr. Rosenberg opined that claimant is not disabled from a pulmonary perspective from performing his previous coal mine job or other similarly arduous types of labor. Employer's Exhibits 3, 4. By contrast, Dr. Rasmussen opined that claimant does not retain the pulmonary capacity to perform his last regular coal mine job, which required heavy and very heavy manual labor. Director's Exhibit 9.

employer. Contrary to claimant's assertion, in weighing the evidence in the record as a whole, the administrative law judge acted within his discretion in finding that the qualifying exercise portion of the January 24, 2007 arterial blood gas study did not establish total respiratory disability. *See Ondecko*, 512 U.S. at 281, 18 BLR at 2A-12. The administrative law judge was not required to find that claimant established total respiratory disability based on the qualifying post-exercise arterial blood gas study. *Beatty v. Danri Corp*., 16 BLR 1-11, 1-13-14 (1991); *Fields v. Island Creek Coal Co*., 10 BLR 1-19, 1-21 (1987). Thus, we reject claimant's assertion that the administrative law judge relied on an improper standard of counting the number of arterial blood gas study results to resolve the issue in favor of employer.

Claimant also asserts that the administrative law judge erred in according greater weight to the opinions of Drs. Zaldivar and Hippensteel than to the opinion of Dr. Rasmussen because, claimant alleges, the former opinions are hostile to the Act. Claimant maintains that "the opinions of the employer's physicians [(Drs. Zaldivar and Hippensteel)] are based on assumption[s] which are manifestly hostile to the Black Lung Benefits Act ([*i.e.*,] that negative x-ray interpretations rule out the presence of pneumoconiosis and pulmonary function studies showing lesser impairment are necessarily more accurate than those showing greater." Claimant's Brief at 8 (unpaginated). We disagree. As the trier-of-fact, the administrative law judge has broad discretion to assess the evidence of record and determine whether a party has met its burden of proof. *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984). In weighing the evidence in the record as a whole, the administrative law judge acted within his discretion in finding that Dr. Rasmussen's opinion, that claimant does not retain the pulmonary capacity to perform his last regular coal mine job, was outweighed by the contrary medical evidence of record. *See Ondecko*, 512 U.S. at 281, 18 BLR at 2A-12. Claimant does not point to any evidence indicating that Drs. Zaldivar and Hippensteel relied on generalities to foreclose the possibility that pneumoconiosis can progress after a miner's exposure to coal dust ceases, that simple pneumoconiosis can be totally disabling, or that pneumoconiosis can cause obstructive impairments. Thus, we reject claimant's assertion that the opinions of Drs. Zaldivar and Hippensteel are hostile to the Act. The Board cannot reweigh the evidence or substitute its inferences for those of the administrative law judge. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). We, therefore, affirm the administrative law judge's finding that claimant failed to establish total respiratory disability at Section 718.204(b), as it is supported by substantial evidence.

Finally, claimant contends that the administrative law judge erred in failing to find that his total disability was due to pneumoconiosis. At Section 718.204(c), the administrative law judge found that the issue of whether claimant established total disability due to pneumoconiosis was moot. Nevertheless, in his conclusion, the

administrative law judge reasonably found that, because claimant failed to establish the existence of pneumoconiosis and total respiratory disability, "[i]t is not established [that] his total disability is due to pneumoconiosis." Decision and Order [on Modification] at 25; *see Kuchwara*, 7 BLR at 1-170.

Because the administrative law judge's findings that claimant failed to establish the existence of pneumoconiosis at Section 718.202(a), total respiratory disability at Section 718.204(b), and total disability due to pneumoconiosis at Section 718.204(c) are rational, contain no reversible error, and are supported by substantial evidence, we affirm his finding that claimant failed to establish either a change in conditions or a mistake in a prior determination of fact pursuant to Section 725.310. Consequently, we affirm the administrative law judge's finding that claimant failed to establish a basis for modification and that entitlement to benefits is precluded in this claim. *See Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-6, 1-11 (1994); Decision and Order [on Modification] at 10-11.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge