BRB No. 02-0241 BLA

IRWIN M. CLARK	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
EAGLE NEST, INCORPORATED	)	
	)	DATE ISSUED:
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 of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Roger D. Forman (Forman & Crane, L.C.), for claimant.

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Anne B. Rembrandt (Jackson & Kelly PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (01-BLA-0191) of Administrative Law Judge Richard A. Morgan denying benefits 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).[1] In the initial Decision and Order, Administrative Law Judge Henry

[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.

B. Lasky adjudicated claimant's 1995 duplicate claim.[2] Although Judge Lasky found that the evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) (2000), he found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4) (2000) and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000). Judge Lasky, therefore, found that the evidence was insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000) and denied benefits. By Decision and Order dated April 29, 1998, the Board affirmed Judge Lasky's findings that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4) (2000). *Clark v. Eagle Nest, Inc.*, BRB No. 97-1343 BLA (Apr. 29, 1998) (unpublished). The Board further held that the evidence did not support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) and (a)(3) (2000). *Id.* The Board, therefore, affirmed Judge Kaplan's denial of benefits.[3] *Id.*

Claimant subsequently filed an appeal with the United States Court of Appeals for the Fourth Circuit. By Decision and Order dated December 2, 1998, the Fourth Circuit affirmed the Board's decision. *Clark v. Eagle Nest, Inc.*, No. 98-1692 (4th Cir., Dec. 2, 1998) (unpublished). The Fourth Circuit denied claimant's petition for rehearing and rehearing *en*

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[2]The relevant procedural history of the instant case is as follows: Claimant initially filed a claim for benefits on August 16, 1989. Director's Exhibit 44. The district director denied the claim on January 13, 1990. *Id.* There is no indication that claimant took any further action in regard to his 1989 claim.

Claimant filed a second claim on January 20, 1995. Director's Exhibit 1.

[3]In light of its disposition of the case on the merits at 20 C.F.R. §718.202(a) (2000), the Board found it unnecessary to address Administrative Law Judge Henry B. Lasky's findings pursuant to 20 C.F.R. §§718.204(b) and (c) (2000) and 725.309 (2000). *Clark v. Eagle Nest, Inc.*, BRB No. 97-1343 BLA (Apr. 29, 1998) (unpublished).

banc. *Clark v. Eagle Nest, Inc.*, No. 98-1692 (4th Cir., Feb. 8, 1999) (Order) (unpublished).

Claimant subsequently filed a timely request for modification of his denied claim. Finding that claimant failed to demonstrate a change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000), Administrative Law Judge Richard A. Morgan (the administrative law judge) denied claimant's request for modification. On appeal, claimant contends that the evidence is sufficient to establish the existence of "legal pneumoconiosis." Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.[4]

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

The Board has held that in considering whether a claimant has established a change in conditions pursuant to 20 C.F.R. §725.310 (2000),[5] 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. *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). The Fourth Circuit affirmed the Board's denial of benefits, a denial based upon an affirmance of Judge Lasky's findings that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) (2000). Consequently, the issue properly before the administrative law judge was whether the newly submitted evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R.

[4]Because no party challenges the administrative law judge's finding that there was not a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000), this is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[5]Although Section 725.310 has been revised, these revisions apply only to claims filed after January 19, 2001.

§718.202(a).

Because no party challenges the administrative law judge's findings that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (a)(2) and (a)(3), these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Claimant, however, contends that the administrative law judge erred in finding that the newly submitted medical opinion evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Among the newly submitted medical opinions, Dr. Rasmussen is the only physician who opined that claimant suffers from pneumoconiosis. The administrative law judge noted that Dr. Rasmussen, in a report dated June 25, 1999, diagnosed "coal workers' pneumoconiosis" based upon Dr. Patel's positive interpretation of a May 14, 1999 x-ray and claimant's coal mine employment history. Decision and Order at 17; Director's Exhibit 80; *see* 20 C.F.R. §718.202(a)(1). The administrative law judge, however, accorded "little weight" to Dr. Rasmussen's finding of "coal workers' pneumoconiosis" because Dr. Rasmussen indicated, during a subsequent deposition, that he had interpreted claimant's May 14, 1999 x-ray as negative for pneumoconiosis. Decision and Order at 17; Director's Exhibit 104. Because no party challenges the administrative law judge's basis for discrediting Dr. Rasmussen's diagnosis of "coal workers' pneumoconiosis," this finding is affirmed. *Skrack, supra*. We, therefore, affirm the alj's finding that the newly submitted evidence is insufficient to establish "clinical pneumoconiosis" pursuant to 20 C.F.R. §718.202(a)(4). *See* 20 C.F.R. §718.202(a)(1).

Claimant, however, notes that Dr. Rasmussen also diagnosed "legal pneumoconiosis," attributing claimant's disabling obstructive impairment to his cigarette smoking and coal dust exposure. *See* 20 C.F.R. §718.201(a)(2). Claimant contends that the administrative law judge erred in finding Dr. Rasmussen's finding of "legal pneumoconiosis" insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

The administrative law judge noted that Dr. Rasmussen opined that claimant suffered from chronic obstructive lung disease due to his coal mine dust exposure and smoking history, a finding which, if credited, supports a finding of "legal pneumoconiosis" pursuant to 20 C.F.R. §718.201(a)(2). Decision and Order at 18. The administrative law judge, however, noted that Drs. Castle, Fino, Walker, Rosenberg and Zaldivar opined that claimant's chronic obstructive pulmonary disease was not due to his coal dust exposure, but was due to his extensive smoking history. *Id.* In finding the newly submitted medical opinion evidence insufficient to establish "legal pneumoconiosis," the alj credited the opinions of Drs. Castle, Fino, Rosenberg and Zaldivar over that of Dr. Rasmussen. *Id.*

Claimant asserts that the administrative law judge erred in relying upon the opinions of Drs. Castle, Fino, Rosenberg and Zaldivar because they erroneously assumed that coal dust exposure does not cause a purely obstructive impairment.[6] In *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995), the Fourth Circuit held that an administrative law judge should not rely on a physician's opinion that a miner does not suffer from pneumoconiosis when it is based on an assumption that obstructive disorders cannot be caused by coal mine employment. *Warth*, 60 F.3d at 174-175, 19 BLR at 2-268-269. However, the Fourth Circuit subsequently clarified its holding in *Warth*. Specifically, in *Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996), the Fourth Circuit explained that administrative law judges are not precluded from relying on physicians' opinions that are not based upon the erroneous assumption that coal mine employment can never cause chronic obstructive pulmonary disease. Among the four physicians credited by the administrative law judge, only Dr. Rosenberg appears to have improperly assumed that coal dust exposure cannot cause obstructive pulmonary disease.[7] *See* Employer's Exhibit 7. Unlike the physicians in *Warth*, Drs. Castle, Fino, and Zaldivar did not assume that coal dust exposure can never cause an obstructive lung disease. *See* Director's Exhibits 48, 51, 58, Employer's Exhibits 4, 5. Consequently, the administrative law judge could properly rely upon the opinions of Drs. Castle, Fino, and Zaldivar.

The administrative law judge credited the opinions of Drs. Castle, Fino and Zaldivar that claimant's chronic obstructive pulmonary disease was not due to his coal mine employment over Dr. Rasmussen's contrary opinion based upon their superior qualifications. *See Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); Decision and Order at 18. The administrative law judge properly noted that although Dr. Rasmussen is Board-certified in Internal Medicine, Director's Exhibit 104, Drs. Castle, Fino, and Zaldivar are Board-certified in both Internal Medicine and

[6]Claimant also contends that the administrative law judge erred in relying upon Dr. Crisalli's opinion. The administrative law judge, however, did not rely upon Dr. Crisalli's opinion. The administrative law judge found that Dr. Crisalli did not provide a basis for his conclusion that claimant's total disability was due to his tobacco smoke-related lung disease. Decision and Order at 10.

[7]Dr. Rosenberg opined that coal dust does not cause clinically significant chronic obstructive pulmonary disease. Employer's Exhibit 7. Dr. Rosenberg further indicated that "analysis of the medical literature clearly indicates that a decreased FEV1 % (the primary physiologic indicator for the presence of chronic obstructive lung disease) is not reduced in a clinically significant fashion by the inhalation of coal dust." *Id.*

Pulmonary Disease. Decision and Order at 18; Director's Exhibit 51; Employer's Exhibits 4, 5. Because it is based upon substantial evidence, we affirm the administrative law judge's finding that the newly submitted medical opinion evidence is insufficient to establish the existence of "legal pneumoconiosis" pursuant to 20 C.F.R. §718.202(a)(4).[8] *See* 20 C.F.R. §718.201(a)(2).

In light of our affirmance of the administrative law judge's findings that the newly submitted medical evidence is insufficient to establish the existence of either clinical pneumoconiosis or legal pneumoconiosis, we affirm the administrative law judge's finding that the newly submitted medical opinion evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

[8]Although the administrative law judge erred in relying upon Dr. Rosenberg's opinion, the administrative law judge's error is harmless in light of the fact that he properly relied upon the opinions of Drs. Castle, Fino and Zaldivar in support of his finding that the miner's chronic obstructive lung disease was not attributable to his coal dust exposure. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Moreover, since we have affirmed the administrative law judge's findings that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), *see Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), we affirm the administrative law judge's finding that the evidence is insufficient to establish a change in conditions pursuant to 20 C.F.R. §725.310 (2000).[9] *Nataloni*, *supra*.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

[9]The administrative law judge also found that the newly submitted evidence was insufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Decision and Order at 20-21. However, because the Fourth Circuit's denial of claimant's 1995 claim was not based upon a finding that claimant failed to establish that his total disability was due to pneumoconiosis, we need not address this finding. *See Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993).