BRB No. 05-0536 BLA

HAROLD JUSTUS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DOTSON & JUSTUS COAL COMPANY	)	DATE ISSUED: 12/22/2005
	)	
and	)	
	)	
KNOX CREEK/A.T. MASSEY	)	
	)	
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 Denying Modification and Benefits of Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

W. Andrew Delph, Jr. (Wolfe Williams & Rutherford), Norton, Virginia, for claimant.

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

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Modification and Benefits (03-BLA-0126) of Administrative Law Judge Pamela Lakes Wood rendered 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). Initially, the administrative law judge reviewed the procedural history of this claim, filed in January 1983, which has remained pending based on requests for modification filed by claimant.[1] The administrative law judge found that this case involves a request for modification of the

[1] Claimant filed his initial application for benefits on January 31, 1983, which was ultimately denied by Administrative Law Judge Joel A. Harmatz on November 13, 1987, based on his finding that although claimant established the existence of pneumoconiosis, he had failed to establish a totally disabling respiratory impairment. Director's Exhibits 1, 58. Claimant filed his first request for modification on March 3, 1988, which was denied by Administrative Law Judge Giles J. McCarthy on December 31, 1991 because claimant failed to establish either a change in conditions or a mistake in fact. Director's Exhibits 59, 105. Claimant again requested modification on December 28, 1992, which was initially denied by Administrative Law Judge Julius Johnson on February 16, 1994. Director's Exhibits 106, 160. On appeal, the Board affirmed Judge Johnson's finding that claimant established a change in conditions by establishing a total respiratory disability, but vacated the denial of benefits and remanded the case for *de novo* consideration of the record, in its entirety, on the issue of the existence of pneumoconiosis. *Justus v. Dotson & Justus Coal Co.*, BRB Nos. 94-3818 BLA and 94-3818 BLA-A (Jul. 13, 1995)(unpub.); Director's Exhibit 178. On remand, the case was assigned to Administrative Law Judge Richard K. Malamphy, who issued a Decision and Order on June 16, 1996, finding that claimant failed to establish the existence of pneumoconiosis and, thus, denied benefits. Director's Exhibit 183. Judge Malamphy's decision was affirmed by the Board on June 26, 1997. *Justus v. Dotson & Justus Coal Co.*, BRB No. 96-1384 BLA (Jun. 26, 1997)(unpub.); Director's Exhibit 192. Claimant requested modification of Judge Malamphy's decision on July 22, 1997, which was denied by Administrative Law Judge Thomas M. Burke on June 3, 1999. Director's Exhibits 193, 215. Claimant requested modification of Judge Burke's Decision and Order on July 14, 1999, which was denied by the district director on September 14, 1999. Director's Exhibits 216, 219. Claimant thereafter filed five additional requests for modification, each of which was denied by the district director because claimant did not establish the existence of pneumoconiosis. Director's Exhibits 220, 223, 228, 229, 233, 235-237, 240, 245, 247, 248. Claimant filed his current request for modification on May 29, 2001, which was denied by the district director. Director's Exhibits 249, 250. Claimant then submitted additional evidence. Based on this new evidence, the district director issued a proposed Decision and Order Granting Claimant's Request for Modification on August 15, 2002, finding that claimant established a change in conditions and thus, established entitlement to benefits. Director's Exhibit 260. The claim was thereafter forwarded to the Office of Administrative Law Judges. Director's Exhibit 278.

Decision and Order of Administrative Law Judge Thomas M. Burke issued on June 22, 1999, in which benefits were denied based on a finding that claimant failed to establish the existence of pneumoconiosis and, thus, failed to establish a change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000).[2]

Addressing claimant's current request for modification filed on May 29, 2001, the administrative law judge credited claimant with nineteen years of coal mine employment[3] and found that the newly submitted evidence, considered together with the previously submitted evidence, did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and thus, did not establish a change in conditions. In addition, she found that the evidence of record did not support a finding that there was a mistake in a determination of fact in Judge Burke's 1999 Decision and Order. Consequently, the administrative law judge found that there was no basis to grant claimant's request for modification pursuant to Section 725.310 (2000). Accordingly, she denied benefits.

On appeal, claimant challenges the administrative law judge's denial of benefits, arguing that the administrative law judge erred in weighing the x-ray evidence of record. In particular, claimant contends that the administrative law judge mechanically relied on numerical superiority in weighing the x-ray evidence of record. In response, employer urges affirmance of the administrative law judge's denial of claimant's request for modification as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has filed a letter stating that he will not file a response brief in this appeal.

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).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the

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[2] Because this claim was pending on January 19, 2001, the effective date of revisions to the regulations, the former version of 20 C.F.R. §725.310 applies to this claim. 20 C.F.R. §725.2(c).

[3] The record indicates that claimant's last coal mine employment occurred in Virginia. Director's Exhibits 2-7. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc).*

pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any one of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and contains no reversible error. Pursuant to Section 718.202(a)(1), the administrative law judge found that the newly submitted x-ray evidence consisted of forty readings of thirteen x-rays taken between 1999 and 2002, of which eleven readings were positive for the existence of pneumoconiosis. Decision and Order at 8; Director's Exhibits 226, 227, 234, 238, 249, 258, 270-272; Employer's Exhibits 1-3. However, taking into consideration the qualifications of the physicians providing the interpretations, she found that the preponderance of the readings for nine of the x-ray films were negative for pneumoconiosis, whereas the preponderance of the readings of the remaining four films was positive. Decision and Order at 8. Based on this analysis, the administrative law judge found that the x-ray evidence was "at best, in equipoise, as equally qualified readers disagree as to whether the Claimant has pneumoconiosis." Decision and Order at 8. The administrative law judge therefore determined that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1).

On appeal, claimant contends that the administrative law judge erred in weighing the x-ray evidence of record, arguing that she mechanically counted the number of negative versus positive x-rays in finding the evidence to be in equipoise, and thus merely "counted heads." Claimant's Brief at 2-3. Claimant also alleges that due to the disparity in resources between employer and claimant, it is not possible for claimant to establish entitlement by a preponderance of the evidence under the administrative law judge's weighing of the evidence. Claimant's Brief at 2. In addition, claimant contends that the administrative law judge erred in failing to consider the party affiliation of the x-ray readers. Claimant's Brief at 2. These contentions lack merit.

The administrative law judge correctly noted that claimant bears the burden of establishing each of the elements of entitlement by a preponderance of the evidence. *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994). Additionally, although claimant alleges that employer flooded the record with x-ray evidence, the record reflects that claimant did not object to the admission of any of employer's x-ray readings. Hearing Tr. at 5, 39. Moreover, the limitations on evidence set forth in the revised regulations are not applicable in this claim because it was pending on January 19, 2001. 20 C.F.R. §725.2(c). Thus, the administrative law judge properly considered all of x-ray evidence submitted since Judge Burke's 1999 Decision and Order.

Furthermore, contrary to claimant's contention, a review of the administrative law judge's Decision and Order reflects that she did not merely count the number of negative readings versus positive readings when she weighed the x-ray evidence, but considered the readings of each x-ray in light of the readers' radiological credentials. Decision and Order at 8. Thus, while noting that a majority of the readings by the better qualified physicians was negative for the existence of pneumoconiosis, she nonetheless found that the record contains both positive and negative readings of the most recent x-ray evidence by dually qualified physicians and that therefore, the evidence was at best in equipoise. *Id*. Moreover, contrary to claimant's contention, the administrative law judge was not required to examine the party affiliation of the physicians who read the x-rays, absent a showing of bias. *See Cochran v. Consolidation Coal Co.*, 16 BLR 1-101, 1-104 (1992); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-35-36 (1991)(*en banc*). Since the administrative law judge considered both the quantity and the quality of the x-ray evidence in finding the evidence to be in equipoise, we affirm her finding that claimant did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) by a preponderance of the evidence. *Ondecko*, 512 U.S. at 281, 18 BLR at 2A-12; *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *see generally Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995).

In his Petition for Review and brief, claimant does not challenge the administrative law judge's findings that the newly submitted evidence did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(2)-(4). The Board's review is properly invoked when the appealing party assigns specific allegations of legal or factual error in the administrative law judge's decision. Failure to do so precludes review and requires the Board to affirm the decision below. 20 C.F.R. §802.211(b); *see Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983); *see also Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986). As claimant does not challenge the administrative law judge's findings pursuant to Section 718.202(a)(2)-(4), those findings are affirmed. *Id*. Consequently, we affirm the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis and did not establish a change in conditions. 20 C.F.R. §725.310 (2000).

Because claimant did not establish a change in conditions, and he does not challenge the administrative law judge's finding that there was no mistake in a determination of fact in the prior denial of benefits, we affirm the administrative law judge's finding that the record does not support a basis for granting modification pursuant to Section 725.310 (2000). *See Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993).

Accordingly, the administrative law judge's Decision and Order Denying Modification and 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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REGINA C. McGRANERY
Administrative Appeals Judge