BRB Nos. 01-0487 BLA
and 01-0487 BLA-A

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| HASKEL V. GILLY<br><br>Claimant-Petitioner<br><br>v.<br><br>WESTMORELAND COAL COMPANY<br><br>Employer-Respondent<br><br>DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR<br><br>Party-in-Interest | ) | DATE ISSUED:<br><br>DECISION and ORDER |

Appeal of the Decision and Order on Third Remand--Denying Benefits of Clement J. Kichuk, Administrative Law Judge, United States Department of Labor.

Haskel V. Gilly, Big Stone Gap, Virginia, *pro se*.

Kathy L. Snyder (Jackson & Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel,[1] appeals and employer cross-appeals the Decision and Order on Third Remand--Denying Benefits (1990-BLA-2253) of Administrative Law Judge Clement J. Kichuk

[1] Ron Carson, a benefits counselor with Stone Mountain Health Services of Vansant, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Mr. Carson is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

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). This case is before the Board for the fourth time.

Claimant filed his application for benefits on June 29, 1984. Director's Exhibit 1. After a hearing, his claim was denied by Administrative Law Judge John Allen Gray, who credited claimant with "at least 25 years" of coal mine employment, found that the medical opinion evidence established the existence of pneumoconiosis, but concluded that the medical evidence did not establish that claimant was totally disabled by a respiratory or pulmonary impairment. Director's Exhibit 44 at 2, 4-6.

Claimant timely requested modification of the denial of benefits and submitted additional medical evidence. Director's Exhibits 49, 52; *see* 33 U.S.C. §922, implemented by 20 C.F.R. §725.310(2000)(providing for modification within one year of a denial, based on a mistake of fact or change in conditions). Employer responded to the modification request with additional medical evidence and challenged claimant's assertion that he was totally disabled by a respiratory or pulmonary impairment, as well as Judge Gray's previous finding that the existence of pneumoconiosis was established. Director's Exhibit 58; *see Branham v. BethEnergy Mines, Inc*., 21 BLR 1-79, 1-82 (1998)(McGranery, J., dissenting)(modification provisions displace traditional notions of finality).

After a hearing, Administrative Law Judge Joan Huddy Rosenzweig denied claimant's modification request, finding that Judge Gray's decision contained no

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[2] 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 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, 145 F.Supp.2d 1 (D.D.C. 2001)(order granting preliminary injunction). The Board subsequently issued an order requesting supplemental briefing in the instant case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, 160 F. Supp.2d 47 (D.D.C. 2001). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

mistakes and that the new evidence did not establish total disability and thus did not demonstrate a change in conditions. Upon consideration of claimant's appeal and employer's cross-appeal, the Board vacated Judge Rosenzweig's decision and remanded the case for her to consider the modification request consistently with *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993). *Gilly v. Westmoreland Coal Co*., BRB Nos. 92-2136 BLA and 92-2136 BLA-A (Jan. 26, 1994)(unpub.). The Board instructed the administrative law judge to consider fully all of the evidence relating to both the existence of pneumoconiosis and the issue of total disability. *Id*.

On remand, Judge Rosenzweig again denied benefits because she found that the new evidence did not establish that claimant was totally disabled, and she therefore declined to consider employer's contention that the record on modification demonstrated that claimant did not have pneumoconiosis. Upon consideration of claimant's appeal, the Board determined that the administrative law judge did not comply with the Board's remand instructions and erred in her weighing of certain evidence. *Gilly v. Westmoreland Coal Co*., BRB No. 96-1632 BLA (Jul. 24, 1997)(unpub.). The Board therefore vacated the administrative law judge's findings and remanded the case for further consideration. *Id*.

On second remand, Judge Rosenzweig granted claimant's modification request and awarded benefits. The administrative law judge found that the chest x-ray evidence of record did not establish the existence of pneumoconiosis, but concluded that the medical opinion evidence established the presence of the disease. Consequently, Judge Rosenzweig determined that Judge Gray made no mistake of fact when he found the existence of pneumoconiosis established. Judge Rosenzweig further found that although claimant's pulmonary function and blood gas tests did not establish total disability, the weight of the medical opinion evidence established that he was totally disabled. Judge Rosenzweig therefore found that a mistake of fact occurred previously when Judge Gray found that total disability was not established. Additionally, the administrative law judge found that the weight of the medical evidence established that claimant's total disability was due to pneumoconiosis. Accordingly, she awarded benefits.

Upon consideration of employer's appeal, the Board vacated the administrative law judge's finding that the existence of pneumoconiosis was established by the medical opinion evidence alone and remanded the case for her to weigh together the x-ray evidence and medical opinions to determine whether the

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[3] Because claimant's coal mine employment occurred in Virginia, Director's Exhibit 2, 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, 1-202 (1989)(*en banc*).

existence of pneumoconiosis was established by a preponderance of all the evidence in accordance with the standard set forth in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). *Gilly v. Westmoreland Coal Co*., BRB No. 98-1540 BLA (May 17, 2000)(unpub.). The Board additionally held that the administrative law judge erred by weighing the conflicting medical opinions on the issues of the existence of pneumoconiosis, total disability, and disability causation without considering all relevant evidence, including the physicians' relative qualifications, the documentation and reasoning underlying their opinions, and the quality of each physician's reasoning and explanation. [2000] *Gilly*, slip op. at 6. Accordingly, the Board vacated the administrative law judge's findings and instructed her to conduct "a full review of the record as a whole" on remand, in accordance with the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), and in accordance with *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998) and *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997). *Id*.

On third remand, Judge Rosenzweig was unavailable and the case was reassigned, without objection, to Administrative Law Judge Clement J. Kichuk. Adjudicating the claim *de novo*, the administrative law judge found that only two of several x-rays taken of claimant's chest supported a finding of the existence of pneumoconiosis. The administrative law judge additionally found that the weight of the most credible medical opinions did not support a finding of the existence of pneumoconiosis. Then, weighing the chest x-ray and medical opinion evidence together, the administrative law judge concluded that a preponderance of all the relevant evidence weighed against a finding of the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). The administrative law judge therefore determined that Judge Gray's finding that the existence of pneumoconiosis was established "amounted to [finding] a mistake of fact . . . ." Decision and Order on Third Remand at 20. Additionally, the administrative law judge found that even if the existence of pneumoconiosis were established, the record on modification did not establish that claimant is totally disabled and thus demonstrated neither a mistake of fact nor a change in conditions to justify modification of the initial denial of benefits by Judge Gray. Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the denial of benefits. Employer responds, urging affirmance of the denial. Additionally, employer cross-appeals, alleging that the administrative law judge erred in taking official notice of a physician's qualifications and erred in according diminished weight to certain medical opinions. The Director, Office of Workers' Compensation Programs (the Director), has declined to participate in either claimant's appeal or employer's cross-

appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co*., 12 BLR 1-176, 1-177 (1989). The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

To determine whether the existence of pneumoconiosis was established, the administrative law judge first considered fifty-five readings of eleven chest x-rays pursuant to 20 C.F.R. §718.202(a)(1). The administrative law judge properly analyzed the conflicting readings of each individual x-ray in light of the readers' radiological credentials to determine whether or not that x-ray supported a finding of the existence of pneumoconiosis. *See Adkins v. Director, OWCP*, 958 F.2d 49, 52, 16 BLR 2-61, 2-66 (4th Cir. 1992). The administrative law judge correctly found that seven of claimant's x-rays received only negative readings by physicians possessing radiological credentials. Turning to the four x-rays for which expert readings were in conflict, the administrative law judge acted within his discretion in deferring to the weight of the readings by physicians qualified as both B-readers and Board-certified radiologists to find that the October 30, 1989 and October 9, 1990 x-rays did not support a finding of the existence of pneumoconiosis, but that the July 13, 1984 and March 25, 1991 x-rays did support a finding of the existence of the disease. *See Adkins, supra*.

Upon review of the record, we conclude that the administrative law judge properly weighed the x-ray readings and that substantial evidence supports his finding. Therefore, we affirm the administrative law judge's finding that two of

claimant's chest x-rays support establishment of the existence of pneumoconiosis. Importantly, however, the administrative law judge recognized that "whether the evidence establishes by a preponderance that [c]laimant suffers from pneumoconiosis must await consideration of all relevant evidence in the record." Decision and Order on Third Remand at 16; *see Compton*, *supra*.

The administrative law judge next found, correctly, that the record contains no biopsy or autopsy evidence to be considered pursuant to 20 C.F.R. §718.202(a)(2). We therefore affirm the administrative law judge's finding. Further, review of the record indicates that the presumptions at Sections 718.304, 718.305, and 718.306 are inapplicable in this living miner's claim filed after January 1, 1982, in which there is no evidence of complicated pneumoconiosis. *See* 20 C.F.R. §§718.304, 718.305, 718.306. Therefore, 20 C.F.R. §718.202(a)(3) is inapplicable.

Additionally, the administrative law judge considered the medical reports and testimony of eight different physicians pursuant to 20 C.F.R. §718.202(a)(4). Review of the record indicates that Dr. G.S. Kanwal, whose credentials are not in the record, examined and tested claimant on July 12, 1984 and diagnosed "exertional dyspnea" with "coal dust exposure and pneumoconiosis," due to "prolonged exposure to coal." Director's Exhibit 8 at 4. Dr. V.D. Modi, who is Board-certified in Internal Medicine, examined and tested claimant on March 5, 1987 and diagnosed "[i]nterstitial pulmonary fibrosis" due to coal dust exposure. Director's Exhibit 27 at 3. Dr. Emory Robinette, whose credentials are not of record, examined and tested claimant on October 30, 1989 and concluded that claimant "most likely has an occupational [sic] acquired pneumoconiosis" based upon a 1/0 chest x-ray reading and claimant's "subjective symptoms" of dyspnea and cough. Director's Exhibit 49 at 3. Dr. Arthur Nash, who is Board-certified in Anesthesiology but works in general practice, examined and tested claimant on March 6, 1990 and diagnosed "coal workers' pneumoconiosis, stage 1/2," and chronic obstructive pulmonary disease. Director's Exhibit 52 at 3. Dr. Nash opined that "nearly all of [claimant's] pulmonary problems arose as a result of working . . . in a dusty environment in and around the mines." *Id*. Dr. Nash was deposed and testified that he based his diagnosis of coal workers' pneumoconiosis upon his own reading of claimant's chest x-ray, and that he personally interpreted claimant's pulmonary function study as revealing a moderate obstructive and a mild restrictive pulmonary impairment. Employer's Exhibit 8 at 6, 12.

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[4] The administrative law judge overlooked the uncontradicted negative reading of a twelfth x-ray dated April 12, 1991 rendered by Dr. A. Dahhan, a B-reader. Employer's Exhibit 5. The administrative law judge's error is harmless, as Dr. Dahhan's reading could only support the administrative law judge's finding that only two x-rays support a finding of the existence of

By contrast, Dr. A. Dahhan, who is Board-certified in Internal Medicine and Pulmonary Disease and who is a B-reader, examined and tested claimant three times and reviewed claimant's medical records on April 23, 1985, May 11, 1990, and April 12, 1991, and concluded that claimant does not have coal workers' pneumoconiosis or any chronic dust disease of the lungs. Director's Exhibits 21 57; Employer's Exhibits 5, 9. In Dr. Dahhan's reports and deposition testimony, he explained that claimant's clinical examinations and chest x-rays did not reveal pneumoconiosis, and that claimant's pulmonary function studies, blood gas studies, and diffusion capacity studies were consistently normal. Employer's Exhibit 9 at 11-13. Dr. Dahhan reported that he found no objective basis to diagnose any respiratory or pulmonary impairment. Employer's Exhibit 9 at 12. Similarly, Drs. George Kress, Bruce Stewart, and Peter Tuteur, all of whom are Board-certified in Internal Medicine and Pulmonary Disease, reviewed claimant's medical records and concluded that he does not have pneumoconiosis and has no respiratory or pulmonary impairment. Director's Exhibit 28; Employer's Exhibit 7.

The administrative law judge found within his discretion that Dr. Dahhan's opinion merited "considerable probative weight" because Dr. Dahhan had not only examined and tested claimant three times, but reviewed all the medical evidence of record and explained in detail how the medical evidence supported his opinion that claimant does not have pneumoconiosis. Decision and Order on Third Remand at 18; *see Hicks, supra*; *Akers, supra*; *Trumbo v. Reading Anthracite Co*., 17 BLR 1-85, 1-88-89 and n.4 (1993). Taking into account Dr. Dahhan's "superior qualifications and training in pulmonary medicine," the administrative law judge permissibly found Dr. Dahhan's opinion to be the "most well-reasoned and supported by the objective medical data . . . ." Decision and Order on Third Remand at 18; *see Hicks, supra*; *Akers, supra*.

By contrast, the administrative law judge permissibly found that Dr. Modi's credibility was "seriously undermined by his conviction and medical license revocation for criminal conduct related to the Federal Black Lung Program, which included falsifying test results . . . ." Decision and Order on Third Remand at 17; *see Hicks, supra*; *Akers, supra*. The administrative law judge also acted within his discretion in according diminished weight to Dr. Nash's diagnosis of pneumoconiosis. Decision and Order on Third Remand at 18. Substantial evidence supports the administrative law judge's finding that Dr. Nash relied heavily on his

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pneumoconiosis. *See Larioni v. Director, OWCP,* 6 BLR 1-1276, 1-1278 (1984).

[5] The record contains the federal indictment of Dr. Modi for income tax evasion and fraud, his plea agreement, and the order of the Virginia Board of Medicine revoking Dr. Modi's medical license. Employer's Exhibit 1.

own "1/2" reading of claimant's March 6, 1990 chest x-ray to diagnose pneumoconiosis, when "every other reader of this film, including those with superior qualifications for the interpretation of such films, read this x-ray as completely negative . . . ." *Id*.; *see Adkins, supra*. Additionally, the administrative law judge rationally considered Dr. Nash's lack of credentials in pulmonary medicine in assessing the reliability of his opinion. *See Hicks, supra*; *Akers, supra*.

Further, the administrative law judge permissibly found Dr. Robinette's opinion, that claimant "most likely" has pneumoconiosis based upon claimant's "subjective symptoms," Director's Exhibit 49 at 3, to be "less than persuasive in light of the detailed discussion provided by Dr. Dahhan in his reports and . . . deposition testimony." Decision and Order on Third Remand at 19; *see Hicks, supra*; *Akers, supra*. Finally, the administrative law judge noted that previously, Judge Gray had provided no rationale for "accord[ing] more weight to Dr. Kanwal over Dr. Dahhan," whereas upon review of the record on modification, the administrative law judge found, within his discretion, that "the opinion of Dr. Dahhan represents the most thorough, well-reasoned and reliable evidence of record regarding claimant's respiratory health." Decision and Order on Third Remand at 17, 19. Substantial evidence supports the administrative law judge's findings, which are rational and in accordance with law. Therefore, we affirm the administrative law judge's finding that the weight of the medical opinion evidence on modification does not support a finding of the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Additionally, substantial evidence supports the administrative law judge's finding that, although "two chest x-rays of record . . . supported a finding of pneumoconiosis," when all of the relevant evidence was weighed together, "[t]he medical opinion evidence outweigh[ed] the x-rays," and the weight of all the evidence therefore "dictate[d] against finding this element of proof established." Decision and Order on Third Remand at 20; *see Compton*, 211 F.3d at 209, 22 BLR at 2-171 ("[W]hether or not a particular . . . type of evidence actually is a sufficient basis for a finding of pneumoconiosis will depend on the evidence in each case.") Therefore, we affirm both the administrative law judge's finding that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a), and his attendant finding that a mistake in a determination of fact occurred previously when Judge Gray found that the existence of pneumoconiosis was established. *See* 20 C.F.R. §725.310(2000); *Jessee, supra*.

The administrative law judge has "full authority to review any and all prior findings of fact under the modification procedure." *Jessee*, 5 F.3d at 724, 18 BLR at 2-28. The administrative law judge permissibly determined that the record as developed on modification did not support a finding of the existence of pneumoconiosis, and he therefore properly denied claimant's request for

modification. Because claimant has failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), a necessary element of entitlement under Part 718, we affirm the denial of benefits. *See Trent, supra*; *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986)(*en banc*). Consequently, we need not address employer's cross-appeal.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge