BRB No. 03-0274 BLA

HELEN D. BRINKLEY (Widow of WOODROW BRINKLEY)	)	
Claimant-Petitioner	)	
v.	)	
PEABODY COAL COMPANY	)	
and	)	
OLD REPUBLIC INSURANCE COMPANY	)	DATE ISSUED: 02/27/2004
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-Denying Benefits of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

Harold P. Culley, Jr. (Culley & Wissore), Raleigh, Illinois, for claimant.

Tab R. Turano, Laura Metcoff Klaus (Greenberg Traurig, LLP), Washington, D.C., for employer.

Rita A. Roppolo (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand-Denying Benefits (2000-BLA-0311) of Administrative Law Judge Rudolf L. Jansen 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).[1] The miner filed this application for benefits on March 6, 1978. Director's Exhibit 1. He died on August 24, 1995, Director's Exhibit 33, and his widow is pursuing his claim. The claim is before the Board for the sixth time. Previously, the Board discussed fully this claim's procedural history. *Brinkley v. Peabody Coal Co.*, BRB No. 01-0611 BLA, slip op. at 2-5 (Apr. 17, 2002)(unpub.). We now focus only on those procedural aspects relevant to the issues raised on appeal of the administrative law judge's decision to grant employer's request for modification and deny benefits.

In a Decision and Order on Remand issued on April 28, 1997, Administrative Law Judge J. Michael O'Neill found that the miner established invocation of the interim presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §727.203(a)(4), and determined that employer did not establish rebuttal of the presumption by any method provided at 20 C.F.R. §727.203(b). Director's Exhibit 28. Accordingly, the administrative law judge awarded benefits. Upon review of employer's appeal, the Board affirmed the award of benefits, but remanded the case for the administrative law judge to make a proper finding as to the onset date of the miner's total disability due to pneumoconiosis. *Brinkley v. Peabody Coal Co.*, BRB No. 97-1174 BLA (May 19, 1998)(unpub.); Director's Exhibit 29. Employer filed a timely motion for reconsideration, which the Board denied on August 3, 1998. Director's Exhibit 30.

On April 22, 1999, employer filed a petition for modification with the district director, alleging a mistake of fact in the previous decision to award benefits. Director's Exhibit 32; 20 C.F.R. §725.310(2000).

After a hearing, Administrative Law Judge Rudolf L. Jansen denied modification in a Decision and Order issued on April 3, 2001. The administrative law judge credited the miner with ten years of coal mine employment pursuant to the parties' stipulation,[2]

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[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] The record indicates that the miner's coal mine employment occurred in Illinois. Director's Exhibit 2. Accordingly, this case arises within the jurisdiction of the United

and found that the miner smoked one pack of cigarettes per day for forty-seven years. The administrative law judge found that the miner established invocation of the interim presumption pursuant to Section 727.203(a)(4). On rebuttal, the administrative law judge determined that none of the expert opinions submitted by employer could outweigh that of the miner's treating physician, Dr. Hauptmann, whose diagnosis of disabling pneumoconiosis received the "greatest weight." [2001] Decision and Order at 15. The administrative law judge gave no weight to the opinions of Drs. Fino and Repsher attributing the miner's obstructive lung disease to smoking, on the ground that the opinions were hostile to the Act. The administrative law judge further determined that Dr. Tuteur's diagnosis of "no clinically significant, physiologically significant, or radiographically significant coal workers' pneumoconiosis or any other coal mine dust-induced disease of the lung," Employer's Exhibit 11 at 7, did not support employer's rebuttal burden but rather, constituted "a positive diagnosis for pneumoconiosis." [2001] Decision and Order at 14. Finding that employer did not establish rebuttal by any method provided under Section 727.203(b), the administrative law judge determined that no change in conditions or mistake of fact was established under Section 725.310(2000) and denied employer's request for modification.

Upon review of employer's appeal, the Board affirmed the administrative law judge's finding that invocation of the interim presumption was established pursuant to Section 727.203(a)(4), but vacated the administrative law judge's rebuttal findings pursuant to Sections 727.203(b)(3), (b)(4). *Brinkley v. Peabody Coal Co.*, BRB No. 01-0611 BLA (Apr. 17, 2002)(unpub.). The Board instructed the administrative law judge on remand to reweigh Dr. Hauptmann's treating opinion consistently with *Peabody Coal Co. v. McCandless*, 255 F.3d 465, 22 BLR 2-311 (7th Cir. 2001). [2002] *Brinkley*, slip op. at 7. The Board held further that the administrative law judge violated *Blakley v. Amax Coal Co.*, 54 F.3d 1313, 19 BLR 2-192 (7th Cir. 1995) when he rejected the opinions of Drs. Fino and Repsher as hostile to the Act. [2002] *Brinkley*, slip op. at 8. The Board also held that the administrative law judge mischaracterized Dr. Tuteur's opinion, and failed to consider relevant evidence. [2002] *Brinkley*, slip op. at 8-9. Accordingly, the Board vacated the administrative law judge's findings pursuant to Section 725.310(2000), and remanded the case for further consideration.

On remand, the administrative law judge determined that Dr. Hauptmann's treating opinion deserved less weight because it was not well documented or reasoned. The administrative law judge found that Dr. Fino's opinion was not well reasoned because "the foundation[] of Dr. Fino's opinion" was that as a matter of science, coal

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States Court of Appeals for the Seventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

dust does not cause obstructive lung disease, a view the Department of Labor rejected when it promulgated revised 20 C.F.R. §718.201(c). Decision and Order on Remand at 6. By contrast, the administrative law judge found that Dr. Repsher's opinion attributing the miner's disability and death to heart disease, and his mild chronic obstructive pulmonary disease (COPD) to long-term smoking, was well documented and reasoned and merited "full weight." *Id*. The administrative law judge specifically determined that Dr. Repsher's opinion did not "rise[] to an unacceptable level of hostility," because Dr. Repsher did not foreclose the possibility that coal dust exposure could cause obstructive disease. *Id*. The administrative law judge found that the opinions of Drs. Dahhan and Tuteur attributing the miner's total disability to smoking and heart disease were also well documented and reasoned. Based on the opinions of Drs. Dahhan, Repsher, and Tuteur, the administrative law judge found that "the majority of the evidence reflects an etiology other than coal mine employment for Mr. Brinkley's disability and death," establishing rebuttal pursuant to Section 727.203(b)(3). Pursuant to Section 727.203(b)(4), the administrative law judge found that the chest x-ray evidence did not establish the existence of pneumoconiosis, and gave "greatest weight" to the "well documented and reasoned" opinions of Drs. Tuteur, Repsher, and Dahhan that the miner did not have pneumoconiosis.[3] Decision and Order on Remand at 8. Consequently, the administrative law judge determined that a "weighing of all the medical evidence" established rebuttal pursuant to Section 727.203(b)(4).

Because rebuttal was established, the administrative law judge found a mistake in a determination of fact established pursuant to Section 725.310(2000). The administrative law judge additionally determined that reopening the claim based on a mistake of fact rendered justice under the Act. Finally, the administrative law judge considered entitlement pursuant to 20 C.F.R. Part 718, and found that claimant did not establish the existence of pneumoconiosis or that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a), 718.204(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that employer's modification request was untimely. Claimant further asserts that the administrative law judge erred in his analysis of Dr.

[3] The administrative law judge found that the opinions of Drs. Sanjabi and Seten were equivocal as to whether the miner had pneumoconiosis, and thus did not weigh against rebuttal. Decision and Order on Remand at 8. Because the administrative law judge's findings regarding the opinions of Drs. Sanjabi and Seten are not challenged on appeal, they are affirmed. *See Skrack v. Island Creek Coal Co*., 6 BLR 1-710, 1-711 (1983). We note that in claimant's brief she discusses Dr. Seten's opinion, but agrees that Dr. Seten's opinion was equivocal regarding the etiology of the miner's COPD. Claimant's Brief at 23-24.

Hauptmann's treating opinion. Claimant alleges that the administrative law judge erred in giving any weight to the opinions of Drs. Repsher, Tuteur, and Dahhan because the opinions were hostile to the Act. Additionally, claimant argues that the administrative law judge erred in finding that reopening the claim rendered justice under the Act. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), responds that the administrative law judge erred in crediting the opinions of Drs. Repsher and Tuteur without explaining why their views regarding coal dust and obstructive disease are not "contrary to the newly-revised section 718.201 and the supporting data set forth in the preamble" to the revised regulation. Director's Brief at 3. The Director argues further that Dr. Dahhan's opinion is legally insufficient to support a finding of rebuttal pursuant to Sections 727.203(b)(3) or (b)(4). Employer has filed a reply brief reiterating its contentions.

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).

Claimant contends that employer's request for modification was untimely. Claimant's Brief at 11. Claimant's contention lacks merit. Employer's April 22, 1999 modification petition was timely, as it was filed within one year of the Board's August 3, 1998 order denying reconsideration of its decision affirming the award of benefits. *See* 33 U.S.C. §922, as incorporated into the Act by 30 U.S.C. §932(a); 20 C.F.R. §725.310(2000). Consequently, the administrative law judge had jurisdiction to decide the claim.

The miner was presumed to be totally disabled due to pneumoconiosis pursuant to Section 727.203(a)(4). To rebut the presumption under Section 727.203(b)(3), employer had to establish "'that the [miner's] total disability was caused entirely by an impairment other than pneumoconiosis.'" *Amax Coal Co. v. Director, OWCP* [*Chubb*], 312 F.3d 882, 890, 22 BLR 2-514, 2-527 (7th Cir. 2002)(citation omitted). To rebut the presumption under Section 727.203(b)(4), employer had to establish that the miner had neither clinical nor statutory pneumoconiosis. *Chastain v. Freeman United Coal Mining Co.*, 919 F.2d 485, 488-89, 14 BLR 2-130, 2-134 (7th Cir. 1990).

Previously, the administrative law judge found that the opinion of the miner's treating physician diagnosing disabling COPD "due to coal workers' pneumoconiosis," Claimant's Exhibit 1, outweighed all of the medical opinions submitted by employer in its attempted rebuttal. On remand, the administrative law judge reconsidered Dr. Hauptmann's opinion and discounted it. Claimant challenges this determination, Claimant's Brief at 11-16, but substantial evidence supports the administrative law

judge's discretionary findings. An administrative law judge "must have a medical reason for preferring one physician's conclusion over another's." *McCandless*, 255 F.3d at 469, 22 BLR at 2-318. The administrative law judge found that Dr. Hauptmann's opinion actually merited "less weight," because Dr. Hauptmann overstated the miner's coal mine employment by thirty-one years and did not address the possible impact of the miner's smoking history on his condition. Decision and Order on Remand at 5. These were permissible credibility determinations, and substantial evidence supports the administrative law judge's findings. *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 483, 22 BLR 2-265, 2-380 (7th Cir. 2001); *Addison v. Director, OWCP*, 11 BLR 1-68, 1-70 (1988). Therefore, we reject claimant's allegation of error in the weighing of Dr. Hauptmann's opinion.

Claimant contends that the administrative law judge erred in crediting the opinions of Drs. Repsher, Tuteur, and Dahhan. Review of the record reflects that Drs. Repsher, Tuteur, and Dahhan reviewed the miner's medical data and concluded that his respiratory impairment and total disability were unrelated to his coal mine dust exposure, but stemmed from his long-term smoking habit and his severe heart disease. Employer's Exhibits 11-13, 16, 19. The administrative law judge found their opinions to be well documented and reasoned, and worthy of great weight. Decision and Order on Remand at 6-8. Claimant, however, argues that the administrative law judge should have accorded no weight to the opinions because the physicians expressed medical beliefs regarding coal dust and obstructive disease that are contrary to the Act and regulations. The Director alleges that Dr. Repsher's opinion "is contrary to the newly-revised section 718.201," and that Dr. Tuteur's opinion is "[i]n spirit," essentially the same as Dr. Repsher's. Director's Brief at 3, 4.

We hold that the administrative law judge did not err in his analysis of the medical opinions. It is established that an administrative law judge may discredit a medical opinion that is based on medical beliefs contrary to the Act and regulations. *Midland Coal Co. v. Director, OWCP* [*Shores*], --- F.3d ---, 2004 WL 302390 at *4 (7th Cir. 2004); *Blakley*, 54 F.3d at 1321, 19 BLR 2-206. In this case, the administrative law judge specifically found that notwithstanding Dr. Repsher's beliefs regarding coal dust and obstructive lung disease, his opinion did not "rise[] to an unacceptable level of hostility," because Dr. Repsher did not foreclose the possibility that coal dust exposure could cause COPD. Decision and Order on Remand at 6. Substantial evidence supports the administrative law judge's discretionary finding. Employer's Exhibit 19 at 43.

Claimant argues that this finding conflicts with the administrative law judge's decision to discredit Dr. Fino's opinion. We detect no inconsistency, because the administrative law judge specifically determined that the "foundation[]" of Dr. Fino's opinion was his disagreement with the proposition that coal dust can cause the disease COPD, whereas Dr. Repsher's opinion did not exhibit the same degree of conflict with

the principles underlying the regulations.[4] Decision and Order on Remand at 6. Given the administrative law judge's permissible determination regarding Dr. Repsher's opinion, *Shores*, 2004 WL 302390 at *4; *Blakley*, 54 F.3d at 1321, 19 BLR 2-206, the parties present no reason to remand this case for him to reconsider the opinions of Drs. Tuteur and Dahhan.[5]

The administrative law judge exercises broad discretion in weighing expert opinions. *Livermore v. Amax Coal Co*., 297 F.3d 668, 672, 22 BLR 2-399, 2-407 (7th Cir. 2002). In this case substantial evidence supports the administrative law judge's discretionary finding that Drs. Repsher, Tuteur, and Dahhan rendered well reasoned opinions based on the miner's specific medical data. *Summers*, 272 F.3d at 483, 22 BLR at 2-380; *Livermore*, 297 F.3d at 672, 22 BLR at 2-407. Substantial evidence also supports the administrative law judge's findings that these opinions established that the miner's total disability was unrelated to coal mine employment pursuant to Section 727.203(b)(3), and that the miner had neither clinical nor legal pneumoconiosis pursuant to Section 727.203(b)(4). *Chubb*, 312 F.3d at 890, 22 BLR at 2-527; *Chastain*, 919 F.2d at 488-89, 14 BLR at 2-134. Thus, we hold that the administrative law judge permissibly exercised his discretion to weigh the expert opinions based on the specific facts of this case. *Livermore*, 297 F.3d at 672, 22 BLR at 2-407.

The Director argues that Dr. Dahhan's opinion is legally insufficient to establish either subsection (b)(3) or (b)(4) rebuttal because Dr. Dahhan did not state that the miner's emphysema was unrelated to his coal mine employment. Based on a review of the miner's medical records, Dr. Dahhan diagnosed "chronic obstructive lung disease of the variety of chronic bronchitis . . . ." Employer's Exhibit 12 at 6. Dr. Dahhan explained that the miner's "bronchitis was not a result of coal dust exposure," as required by the relevant rebuttal standards, Employer's Exhibit 12 at 7; *Chubb*, 312 F.3d at 890, 22 BLR at 2-527; *Chastain*, 919 F.2d at 488-89, 14 BLR at 2-134, and the administrative law judge found his opinion to be well documented and reasoned. Dr. Dahhan did not diagnose emphysema, but rather, merely noted that other physicians' findings of radiological emphysema was a factor that "demonstrated" the presence of "chronic obstructive lung disease of the variety of chronic bronchitis," which, in Dr. Dahhan's

[4] In promulgating revised Section 718.201(c), the Department of Labor found that prevailing medical science establishes that coal mine dust exposure can cause significant obstructive lung disease. Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969, as Amended, 65 Fed. Reg. 79,920, 79938-44 (Dec. 20, 2000).

[5] Review of Dr. Dahhan's opinion does not disclose that he addressed the general scientific question of whether coal dust can cause the disease COPD. Employer's Exhibit 12 at 6-7.

view, was unrelated to coal mine employment. Employer's Exhibit 12 at 6. Consequently, we reject the Director's contention that Dr. Dahhan's opinion was legally insufficient to support a finding of rebuttal, and we hold that the administrative law judge properly found rebuttal established pursuant to Sections 727.203(b)(3) and (b)(4) based on the opinions of Drs. Repsher, Tuteur, and Dahhan. We therefore affirm the administrative law judge's findings pursuant to Sections 727.203(b)(3) and (b)(4), and his finding that a mistake of fact was established pursuant to Section 725.310(2000).

Claimant next argues that the administrative law judge erred in finding that reopening the claim based on a mistake of fact rendered justice under the Act. Claimant's Brief at 24-28. Claimant alleges that reopening does not render justice under the Act because employer was not diligent in defending the claim, and because employer premised its modification petition on flawed evidence. Claimant's contentions lack merit.

The purpose of modification is to "ensure the accurate distribution of benefits. The reopening provision is not limiting as to party--it is available to employers and miners alike." *Old Ben Coal Co. v. Director, OWCP* [*Hilliard*], 292 F.3d 533, 546, 22 BLR 2-429, 2-451 (7th Cir. 2002)(Wood, J., dissenting). The administrative law judge has the authority on modification "to reconsider all the evidence for any mistake of fact," *Hilliard*, 292 F.3d at 541, 22 BLR at 2-444, including whether the "ultimate fact" was mistakenly decided. *Amax Coal Co. v. Franklin*, 957 F.2d 355, 358, 16 BLR 2-50, 2-54-55 (7th Cir. 1992). An administrative law judge deciding whether to reopen a claim has the discretion to find that considerations grounded in the policy of the Act trump the statutory preference for accuracy of determination in a particular case, so long as the administrative law judge weighs those factors under the standard of whether reopening renders "justice under the Act." *Hilliard*, 292 F.3d at 541-42, 546-47, 22 BLR at 2-451-54 (Wood, J., dissenting).

In this case, the administrative law judge recognized his duty to give weight to the Act's preference for accuracy over finality. Decision and Order on Remand at 9; *see Hilliard*, 292 F.3d at 547, 22 BLR at 2-453. The administrative law judge considered whether other factors might trump the preference for accuracy, and found that they did not. Specifically, the administrative law judge detected no improper purpose in employer's modification request, found that employer had been diligent in its defense of the claim, and determined that employer submitted "quality evidence" in support of its modification request. Decision and Order on Remand at 9. Accordingly, the administrative law judge found, within his discretion, that "to reopen the record renders justice under the Act." *Id*.; *Hilliard*, 292 F.3d at 541-42, 546-47, 22 BLR at 2-451-54; *Branham v. BethEnergy Mines, Inc*., 21 BLR 1-79, 1-82-84 (1998)(McGranery, J., dissenting). Claimant presents no reason to disturb the administrative law judge's discretionary determination. Therefore, we reject claimant's allegations of error and

affirm the administrative law judge's finding that reopening the claim rendered justice under the Act.

Claimant raises no challenge to the administrative law judge's findings that under 20 C.F.R. Part 718, claimant did not establish the existence of pneumoconiosis pursuant to Section 718.202(a), or that the miner's total disability was due to pneumoconiosis pursuant to Section 718.204(c). Those findings are therefore affirmed. *Skrack*, 6 BLR at 1-711.

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