BRB No. 98-0704 BLA

CALVIN D. DUNFORD	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
JEWELL RIDGE/ SEA "B" MINING COMPANY	)	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 on Remand of Anne Beytin Torkington, Administrative Law Judge, United States Department of Labor.

Vincent J. Carroll, Richlands, Virginia, for claimant.

Timothy W. Gresham (Penn, Stuart, & Eskridge), Abingdon, Virginia, for employer.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order on Remand (95-BLA-0828) of Administrative Law Judge Ann Beytin Torkington 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). Claimant filed a claim on August 10, 1979. In the initial Decision and Order, Administrative Law Judge Nicodemo DeGregorio, after crediting claimant with thirty-two years of coal mine employment, found the evidence insufficient to establish invocation of the interim

presumption pursuant to 20 C.F.R. §727.203(a)(1)-(4). Even assuming that the evidence was sufficient to establish invocation of the interim presumption, Judge DeGregorio found that the evidence was sufficient to establish rebuttal pursuant to 20 C.F.R. §727.203(b)(2) and (b)(3). Judge DeGregorio, therefore, found that claimant was not entitled to benefits under 20 C.F.R. Part 727. Judge DeGregorio further opined that claimant was not entitled to benefits under 20 C.F.R. Part 410, Subpart D. Accordingly, Judge DeGregorio denied benefits. By Decision and Order dated September 28, 1984, the Board held that claimant failed to demonstrate any harmful error on Judge DeGregorio's part in finding rebuttal. *Dunford v. Jewell Ridge Coal Corp.*, BRB No. 81-2205 BLA (Sept. 28, 1984) (unpublished). The Board, therefore, affirmed Judge DeGregorio's denial of benefits. *Id.*

Claimant filed a second claim on May 8, 1985. Since claimant's 1985 claim was filed within one year of the issuance of the last denial of his 1979 claim, the 1985 claim constituted a timely request for modification of the 1979 claim pursuant to 20 C.F.R. §725.310. *See Stanley v. Betty B Coal Co.*, 13 BLR 1-72 (1990). In a Decision and Order dated January 24, 1990, Administrative Law Judge John S. Patton, after crediting claimant with thirty-two years of coal mine employment, found the pulmonary function study evidence sufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(2). Judge Patton, however, found that the evidence was also sufficient to establish rebuttal of the interim presumption pursuant to 20 C.F.R. §727.203(b)(3) and (b)(4). Judge Patton, therefore, found that claimant was not entitled to benefits under 20 C.F.R. Part 727. Judge Patton also found that claimant was not entitled to benefits pursuant to 20 C.F.R. §410.490 or under 20 C.F.R. Part 410, Subpart D. Accordingly, Judge Patton denied benefits. By Decision and Order dated January 28, 1992, the Board, *inter alia*, affirmed Judge Patton's finding of rebuttal pursuant to 20 C.F.R. §727.203(b)(4). *Dunford v. Jewell Ridge Coal Corp.*, BRB No. 90-0645 BLA (Jan. 28, 1992) (unpublished). The Board, therefore, affirmed Judge Patton's denial of benefits. *Id.* By Order dated July 13, 1992, the Board denied claimant's motion for reconsideration. *Dunford v. Jewell Ridge Coal Corp.*, BRB No. 90-0645 BLA (July 13, 1992) (unpublished) (Order). The United States Court of Appeals for the Fourth Circuit subsequently affirmed the Board's denial of benefits. *Dunford v. Jewell Ridge Coal Corp.*, No. 92-2071 (4th Cir. Sept. 3, 1993) (unpublished).

Claimant filed a timely request for modification on December 20, 1993. In a Decision and Order dated May 6, 1996, Judge DeGregorio found that claimant failed to establish a change in conditions pursuant to 20 C.F.R. §725.310. Accordingly, Judge DeGregorio denied benefits. By Decision and Order dated May 16, 1997, the Board held that Judge DeGregorio erred in not addressing whether there was a mistake in a determination of fact pursuant to 20 C.F.R. §725.310. *Dunford v. Jewell*

Ridge/Sea "B" Mining Co., BRB No. 96-1085 BLA (May 16, 1997) (unpublished). The Board further held that the administrative law judge erred in not applying the adjudicatory criteria of 20 C.F.R. Part 727 to the claim. *Id.* The Board, therefore, vacated Judge DeGregorio's Decision and Order denying benefits and remanded the case for further consideration. *Id.*

Due to Judge DeGregorio's unavailability, Administrative Law Judge Ann Beytin Torkington (the administrative law judge) reconsidered the claim on remand. 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, the administrative law judge denied claimant's request for modification. On appeal, claimant contends that the administrative law judge erred in denying modification pursuant to 20 C.F.R. §725.310. 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.

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).

Claimant contends that the administrative law judge erred in finding the newly submitted x-ray evidence insufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1). Claimant notes that the "flood of negative x-rays comes with the submission of this case from the responsible operator." Claimant's Brief at 3. Citing *Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993)[1], claimant appears to argue that the

[1]In *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993), the Sixth Circuit held that an administrative law judge erred by considering "unduly

administrative law judge, in his evaluation of the x-ray evidence, erred in not considering party affiliation.

We initially note that the instant case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. Because there is no evidence that claimant performed any coal mine employment within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, *Woodward* is not controlling.

Moreover, even if applicable, the administrative law judge's analysis does not violate the reasoning of *Woodward*. While *Woodward* permits an administrative law judge to consider party affiliation when evaluating x-ray evidence, an administrative law judge may not accord less weight to x-ray interpretations based upon party affiliation unless he properly determines, based upon evidence in the record, that the physicians retained by a party are biased. See *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*); *see also Cochran v. Consolidated Coal Co.*, 16 BLR 1-101 (1992); *Chancey v. Consolidation Coal Co.*, 7 BLR 1-240 (1984). Furthermore, although *Woodward* allows for consideration of party affiliation, the United States Court of Appeals for the Sixth Circuit has not held that party affiliation should be dispositive in determining the weight to be assigned the medical evidence of record. Consequently, the administrative law judge did not err in not considering party affiliation in the instant case.

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repetitious" evidence surrounding the x-rays. The Sixth Circuit held that:

> Administrative factfinders simply cannot consider the quantity of evidence alone, without reference to a difference in the qualifications of the readers or without an examination of the party affiliation of the experts. In other words, consideration of merely quantitative differences, without an attendant qualitative evaluation of the x-rays and their readers, is legal error.

Woodward, 17 BLR at 2-87 (citation omitted).

In his consideration of the newly submitted x-ray evidence, the administrative law judge properly accorded greater weight to the interpretations rendered by physicians who are qualified as B readers and/or Board-certified radiologists. *See Vance v. Eastern Associated Coal Corp.*, 8 BLR 1-68 (1985); Decision and Order on Remand at 4. While the claimant's January 11, 1994, October 18, 1994 and December 29, 1994 x-rays were each read as positive by two physicians qualified as B readers and/or Board-certified radiologists, Director's Exhibit 152; Claimant's Exhibits 1-3, 5, 6, these same x-rays were also each read as negative by at least four equally qualified physicians. Director's Exhibits 159, 165, 168, 169; Employer's Exhibits 4-7, 9. Moreover, claimant's December 23, 1993, February 22, 1994 and August 23, 1994 x-rays were uniformly interpreted as negative for pneumoconiosis by physicians qualified as B readers and/or Board-certified radiologists. Director's Exhibits 159, 161, 162; Employer's Exhibits 1, 3. Inasmuch as it is supported by substantial evidence, we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1).[2]

Turning to the issue of rebuttal, claimant argues that the administrative law judge erred in finding the newly submitted medical opinion evidence sufficient to establish rebuttal pursuant to 20 C.F.R. §727.203(b)(4). Among the newly submitted medical opinion evidence, Drs. Strader, Chithambo, Caday and Ugolini diagnosed pneumoconiosis, Director's Exhibits 147, 152, 155; Claimant's Exhibit 4, while Drs. Michos, Sargent and Fino opined that claimant does not suffer from pneumoconiosis. Director's Exhibits 156, 165; Employer's Exhibits 8, 9. The administrative law judge permissibly found that the opinions of Drs. Sargent and Fino were better reasoned and documented than the opinions of Drs. Strader, Chithambo, Caday and Ugolini. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order on Remand at 12.

Claimant argues that the physicians who found that claimant does not suffer from pneumoconiosis did not rule out the existence of legal pneumoconiosis.

[2]The administrative law judge properly found that there was no biopsy evidence supportive of a finding of pneumoconiosis. Decision and Order on Remand at 4-5.

Contrary to claimant's contention, Drs. Sargent and Fino, in addition to opining that claimant did not suffer from pneumoconiosis, also opined that claimant did not suffer from any lung disease arising out of his coal mine employment. *See* 20 C.F.R. §727.202; Employer's Exhibits 8, 9, 11.

Claimant also argues that the administrative law judge, in his consideration of the newly submitted medical opinion evidence, erred in not according greater weight to the opinions of Drs. Strader and Caday based upon their status as claimant's treating physicians. We disagree. While an administrative law judge, as a general matter, may accord more weight to the opinion of a treating physician, he is not required to do so. *See Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Addison v. Director, OWCP*, 11 BLR 1-68 (1988). Moreover, the administrative law judge provided proper reasons for discrediting the opinions of Drs. Strader and Caday. The administrative law judge properly found that the opinions of Drs. Strader and Caday were too equivocal to support a diagnosis of pneumoconiosis. *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987); Decision and Order on Remand at 12. Inasmuch as claimant does not challenge the administrative law judge's reasons for discrediting the opinions of Drs. Strader and Caday, the administrative law judge's findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

The administrative law judge also properly credited the opinions of Drs. Sargent and Fino that claimant did not suffer from pneumoconiosis because he found that they were based upon more comprehensive documentation. *See Sabett v. Director, OWCP*, 7 BLR 1-299 (1984); Decision and Order on Remand at 11-12. While the administrative law judge noted that Drs. Sargent and Fino had reviewed the medical evidence developed since 1979, the year that claimant ceased his coal mine employment, the administrative law judge noted that Dr. Chithambo did not review claimant's medical record and that Dr. Ugolini only reviewed evidence developed since 1988, the year that claimant underwent a lobectomy. Decision and Order on Remand at 11-12.

The administrative law judge also accorded greater weight to the opinions of Drs. Sargent and Fino based upon their "excellent qualifications." Decision and Order on Remand at 12. Recently, in *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 536, 21 BLR 2-323, 2-341 (4th Cir. 1998), the United States Court of Appeals for the Fourth Circuit has expressly recognized that "experts' respective qualifications are important indicators of the reliability of their opinions," citing *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997). The record reflects that Drs. Sargent and Fino are each Board-certified in Internal Medicine and Pulmonary

Disease. Director's Exhibits 165, 169. While Dr. Ugolini is Board-certified in Internal Medicine, he is only Board-eligible in Occupational Medicine. Claimant's Exhibit 4. Dr. Chithambo's qualifications are not found in the record. Inasmuch as it is based upon substantial evidence, we affirm the administrative law judge's finding that the newly submitted evidence is sufficient to establish rebuttal pursuant to 20 C.F.R. §727.203(b)(4).[3] Consequently, we affirm the administrative law judge's finding that claimant failed to establish a change in conditions pursuant to 20 C.F.R. §725.310.

Modification may also be based upon a mistake in a determination of fact. 20 C.F.R. §725.310. The United States Court of Appeals for the Fourth Circuit has held that a claimant need not allege a specific error in order for an administrative law judge to find modification based upon a mistake in a determination of fact. *See Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993). Based upon a *de novo* review of the record, the administrative law judge found "no mistake in either the underlying or ultimate facts by Judge Patton in his decision of January 24, 1990, or by Judge DeGregorio in his decision of October 23, 1981." Decision and Order on Remand at 13. Consequently, we affirm the administrative law judge's finding that claimant failed to establish a mistake in a determination of fact pursuant to 20 C.F.R. §725.310.

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[3]In light of our affirmance of the administrative law judge's finding of rebuttal pursuant to 20 C.F.R. §727.203(b)(4), entitlement is precluded under 20 C.F.R. Part 410, Subpart D. *See Lefler v. Freeman United Coal Co.*, 6 BLR 1-579 (1983).

A claim which is properly adjudicated pursuant to 20 C.F.R. §727.203 is not subject to adjudication under 20 C.F.R. §410.490. *Pauley v. Bethenergy Mines, Inc.*, 111 S.Ct. 2524, 15 BLR 2-155 (1991); *Whiteman v. Boyle Land and Fuel Co.*, 15 BLR 1-11 (1991)(*en banc*).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge