BRB No. 02-0358 BLA

FLOYD W. SHARP	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
RAG AMERICAN COAL COMPANY – MIDWEST	)	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 - Denying Modification of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

Sandra M. Fogel (Culley & Wissore), Carbondale, Illinois, for claimant.

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

Before: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (99-BLA-1257) of Administrative Law Judge Rudolf L. Jansen denying claimant's request for modification of the denial of a duplicate claim[1] filed pursuant to the provisions of Title IV of the Federal Coal Mine Health

[1] Claimant, Floyd W. Sharp, filed his first claim for benefits on January 30, 1984. That claim was denied by the district director on July 27, 1984, because claimant failed to establish any elements of entitlement. Director's Exhibit 23. Claimant took no further action on that claim. He filed a duplicate claim for benefits on November 22, 1991. Director's Exhibit 1. After the district director denied the duplicate claim on January 30, 1992, April 23, 1992, and January 7, 1994, claimant requested a formal hearing, which was conducted by Administrative Law Judge Daniel J. Roketenetz. In a Decision and Order dated April 30, 1996, Judge Roketenetz denied benefits because claimant failed to establish the existence of

and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act).[2] Adjudicating claimant's request for modification of the denial of his duplicate claim pursuant to 20 C.F.R. Part 718, the administrative law judge credited the parties' stipulation that claimant worked eighteen years in qualifying coal mine work. Finding "[f]or purposes of discussion only," that the newly submitted pulmonary function study and medical opinion evidence was sufficient to demonstrate total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (iv), the administrative law judge nonetheless concluded that such a determination could not serve as a basis to establish a material change in conditions because total disability was not the element of entitlement previously adjudicated against claimant in the prior denial. Rather, the administrative law judge determined that because claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), the sole element that was previously adjudicated against him, claimant failed to demonstrate that a material change in conditions was established pursuant to 20 C.F.R. §725.309 (2000). Accordingly, the administrative law judge denied claimant's request for modification of the denial of his duplicate claim. Benefits were, therefore, denied.

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pneumoconiosis. Director's Exhibit 47. On March 24, 1997, claimant filed a petition for modification with supporting medical evidence. Director's Exhibit 48. After the district director denied this request for modification, claimant requested a formal hearing which was conducted by Administrative Law Judge Rudolf L. Jansen on January 17, 2001. Judge Jansen issued the Decision and Order denying claimant's request for modification, which is now before the Board on appeal.

[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 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

On appeal, claimant argues that the administrative law judge erred in combining and confusing the standard for adjudicating duplicate claims with the standard for deciding requests for modification, and erred in failing to find the existence of pneumoconiosis established based on the x-ray and medical opinion evidence. In response, employer contends that the administrative law judge properly found that claimant failed to establish the existence of the element of entitlement previously adjudicated against him. Employer agrees with claimant, however, that the administrative law judge's finding that the evidence did not demonstrate any mistake in a determination of fact in the prior decision denying benefits was too cryptic to meet with the requirements of 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), which requires every adjudicatory decision to include sufficient reasoning for its findings and contends that the case must be remanded for reconsideration of the evidence on this issue. The Director, Office of Workers' Compensation Programs (the Director), as party-in-interest, is not participating in this appeal.[3]

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with the applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant argues that the administrative law judge erred in considering only whether a material change in conditions had been established, rather than considering whether claimant established that a mistake in a determination of fact had been made by Administrative Law Judge Daniel J. Roketenetz in his denial of benefits. Employer contends that the administrative law judge's finding as to whether a mistake in a determination of fact had been made is cursory and requires remand of the case for further analysis of this issue.

Contrary to claimant's argument, where modification of a previously denied duplicate claim is sought, the administrative law judge must analyze whether the evidence submitted in support of modification along with the evidence previously submitted in support of the duplicate claim is sufficient to establish a material change in conditions pursuant to Section 725.309 (2000). *Hess v. Director, OWCP*, 21 BLR 1-141, 1-143 (1998). In this case, the

[3] We affirm the administrative law judge's finding of eighteen years of coal mine employment and his finding that total disability was established by the newly submitted evidence because these findings are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order at 11, 14.

administrative law judge found that because claimant was requesting modification of a previously denied duplicate claim, he must determine whether the newly submitted evidence, in conjunction with the evidence submitted with the duplicate claim, was sufficient to establish a material change in conditions pursuant to Section 725.309 (2000). Accordingly, the administrative law judge in this case properly found that the issue before him was whether a material change in conditions had been established, Decision and Order at 9; *Hess*, *supra*, and sufficiently discussed the basis for his finding.

Claimant next contends that the administrative law judge erred when he applied the standard for demonstrating a material change in conditions[4] to the proof required to support a modification request, rather than a duplicate claim. Specifically, claimant contends that the administrative law judge erred in not treating the district director's denial of his 1984 claim as the relevant decision, rather than the 1996 denial by Judge Roketenetz of his duplicate claim. Claimant argues that since the 1984 claim was denied because claimant failed to establish any element of entitlement, the administrative law judge should have considered whether post-1984 evidence supported a finding of pneumoconiosis or total disability.

We agree. Claimant's first claim, filed on January 30, 1984, was denied by the district director on July 27, 1984, because claimant failed to establish the existence of pneumoconiosis and total disability. Director's Exhibit 23. Claimant filed a duplicate claim on November 22, 1991, which was denied by Administrative Law Judge Roketenetz because claimant failed to establish the existence of pneumoconiosis. Director's Exhibits 1, 47. Judge Roketenetz did not consider whether any other element of entitlement was established, however. Claimant requested modification of this denial. The administrative law judge denied claimant's request for modification because claimant failed to establish the existence

[4] Because the instant claim arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit claimant does not dispute that the case law of the Seventh Circuit applies. That court, has adopted the "one element" standard, which requires the miner to prove at least one of the elements of entitlement previously adjudicated against him to determine whether a material change in conditions is demonstrated pursuant to Section 725.309 (2000). *Peabody Coal Co. v. Spese*, 117 F.3d 1001, 21 BLR 2-113 (7th Cir. 1997)(*en banc*), *modifying* 94 F.3d 369 (7th Cir. 1996).

of pneumoconiosis. Further, although the administrative law judge noted that newly submitted pulmonary function studies and medical opinions established total disability, he concluded that he could not find a material change in conditions based on that evidence because total disability was not an element of entitlement previously adjudicated against claimant, referring to Judge Roketenetz's denial based on the finding of no pneumoconiosis. Accordingly, the administrative law judge denied benefits.

As claimant contends, however, his first claim for benefits was denied because he failed to establish the elements of pneumoconiosis and total disability, even though Judge Roketenetz failed to subsequently consider the issue of total disability. The administrative law judge erred, therefore, in finding that a material change in conditions could only be established by demonstrating the existence of pneumoconiosis. Nonetheless, because the administrative law judge found that post 1984 evidence established total disability, we conclude that this finding is sufficient to establish a material change in conditions. *See Spese, supra*. Moreover, because the administrative law judge has stated that his findings are based on an analysis of the entire record, we will review his finding that claimant failed to establish the existence of pneumoconiosis in light of the entire record.

Claimant contends that the administrative law judge erred in finding that claimant failed to establish the existence of pneumoconiosis based on x-ray and medical opinion evidence. Specifically, claimant contends that the administrative law judge erred in his decision: in failing to consider the x-ray films and interpretations made subsequent to the denial of the 1984 claim; in mischaracterizing the newly submitted x-ray evidence of record, and in failing to identify the readings he did consider. Claimant asserts that the newly submitted x-ray evidence consists of forty-one interpretations of eight films, rather than thirty-three interpretations of five films, as found by the administrative law judge. Claimant additionally contends that the administrative law judge erroneously listed an x-ray taken on November 23, 1995 when there is no such x-ray, that he failed to consider four x-rays taken on December 12, 1992, October 9, 1992, October 16, 1992, and October 19, 1992, and that he found that there were six readings of the April 22, 1997 film, rather than seven, based on his omission of Dr. Alexander's positive reading.

Contrary to claimant's contention, the record does contain an x-ray dated November 23, 1995 which was taken during claimant's hospitalization from November 23, 1995 to November 27, 1995, and was read by Dr. Sweeney, who did not render an opinion as to the presence or absence of pneumoconiosis. *See Marra v. Consolidation Coal Co.*, 7 BLR 1-216, 1-217-218 (1984); Director's Exhibit 55; Decision and Order at 5, 10. Further, contrary to claimant's argument, however, the administrative law judge correctly listed all eight readings of the April 22, 1997 x-ray in his summary of the x-ray evidence, including the positive interpretation rendered by Dr. Alexander. Decision and Order at 4-5; Director's Exhibit 68; Claimant's Exhibits 1-4.

Claimant also avers that the administrative law judge erred in finding that the June 17, 1992 film was negative for the existence of pneumoconiosis when four out of six interpretations of this film were read positive. The newly submitted interpretations of the June 17, 1992 film, however, consist of three negative readings by two Board-certified radiologists and one B-reader. Employer's Exhibits 1, 4, 8. Thus, the administrative law judge could find that this x-ray was insufficient to establish the existence of pneumoconiosis. *See Old Ben Coal Co. v. Scott*, 144 F.3d 1045, 21 BLR 2-391 (7th Cir. 1998); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); Decision and Order at 10.

Claimant contends further that the administrative law judge erred in finding that all of the physicians who provided readings of the August 21, 1997 film possessed dual radiological qualifications whereas three physicians were B-readers only. Contrary to claimant's contention, however, the administrative law judge merely noted that the August 21, 1997 x-ray was read nineteen separate times, with widely varying interpretations from highly qualified physicians. Decision and Order at 10. Claimant's contention is, therefore, rejected.

Claimant also contends that the administrative law judge failed to reconcile the inconsistent x-ray readings provided by Dr. Stafford, who read the June 17, 1992 x-ray as positive and the x-rays dated August 21, 1997 and October 19, 1992 as negative for the existence of pneumoconiosis. Contrary to claimant's contention, however, Dr. Stafford's readings were not inconsistent since they were readings of different x-rays, not the same x-ray, and the administrative law judge weighing the x-ray evidence as a whole found that the majority of the readings were negative and were verified by dually qualified physicians. *See Battram*, 7 F.3d at 1278, 18 BLR at 2-47; *see Scott*, *supra*; *Trent*, *supra*; *Dixon*, *supra*.

Claimant also argues that the administrative law judge failed to provide a "meaningful" explanation for his finding that the x-rays taken on June 17, 1992, November 23, 1995, April 22, 1997, and August 21, 1997 were negative for the existence of pneumoconiosis. Contrary to claimant's argument, however, after noting that "[e]ach x-ray was read multiple times with dually qualified physicians offering differing opinion[s] as to each one," and after considering the films dated November 23, 1995 April 22, 1997, August 21, 1997, the newly submitted interpretations of the June 12, 1992 film, and the deposition testimony of Dr. Wiot, the administrative law judge rationally determined that the x-rays identified above did not establish the existence of pneumoconiosis since the physicians finding an absence of pneumoconiosis were equally qualified to the physicians finding its presence. *See Battram*, 7 F.3d at 1278, 18 BLR at 2-47; *see Scott*, *supra*; *Trent*, *supra*; *Dixon*, *supra*. In addition, the administrative law judge reasonably credited the negative x-ray interpretations of these x-rays because the physicians who rendered these readings found evidence of pleural thickening that was a result of medical procedures and not a parenchymal

abnormality consistent with pneumoconiosis. *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); Decision and Order at 10. We, therefore, affirm the administrative law judge's finding that the x-ray evidence of record was insufficient to establish the existence of pneumoconiosis under Section 718.202(a)(1) because this determination was rational and supported by substantial evidence. *See* 20 C.F.R. §718.202(a)(1); *Trent, supra*; *Dixon, supra*.

Relevant to Section 718.202(a)(4), claimant argues that the administrative law judge erred by considering only the medical opinions submitted since Judge Roketenetz's denial of claimant's duplicate claim rather than the nine opinions that were submitted in support of the duplicate claim. As discussed previously, because the administrative law judge found that the new evidence established total disability, a material change in conditions was established, and the administrative law judge was required to consider all the medical opinion evidence of record on the existence of pneumoconiosis. *Spese, supra*.

Claimant specifically argues that the administrative law judge erred by failing to evaluate whether the medical opinion evidence was sufficient to establish the existence of not only clinical pneumoconiosis, but also statutory pneumoconiosis.

The administrative law judge, however, permissibly found that Drs. Lenyo and Cohen were the only two physicians who diagnosed the existence of pneumoconiosis or a pulmonary condition substantially related to or aggravated by coal dust exposure, while Drs. Selby, Tuteur, Repsher, and Renn all diagnosed cigarette smoke-induced chronic obstructive pulmonary disease, a condition that does not constitute the existence of statutory pneumoconiosis as defined at Section 718.201. *See Handy v. Director, OWCP*, 16 BLR 1-73, 1-76 (1990); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683, 1-686 (1985); Decision and Order at 11, 12. Because the administrative law judge's analysis reflects a proper evaluation of the medical opinion evidence and, contrary to claimant's argument, does not reflect an abdication by the administrative law judge of his responsibility to determine the sufficiency of the medical opinions, claimant's contention is rejected.

Claimant also asserts that the administrative law judge erred in finding that Dr. Lenyo's qualifications were not contained in the record and in not addressing Dr. Lenyo's two examination reports and extensive treatment notes. The administrative law judge found that the newly submitted evidence contained a hospital note from Dr. Lenyo, claimant's treating physician, which diagnosed coal workers' pneumoconiosis, but the administrative law judge reasonably discounted this diagnosis because Dr. Lenyo did not adequately set forth the basis for his opinion or provide sufficient documentation. *See Peabody Coal Co. v. McCandless*, 255 F.3d 465, 22 BLR 2-311 (7th Cir. 2001); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*);

King v. Consolidation Coal Co., 8 BLR 1-262 (1985); Decision and Order at 12. The administrative law judge also found that Dr. Lenyo's credentials were not of record. Decision and Order at 12. A review of the record, however, reveals that Dr. Lenyo's report dated December 17, 1992, contained in the previously submitted evidence, was written on his letterhead and indicates that he is a Diplomate of the Board of Internal Medicine. Nevertheless, we deem this error to be harmless because the administrative law judge properly found that Dr. Lenyo's opinion was entitled to less weight based upon its deficiencies, including inadequate explanation and insufficient documentation. *Ibid*; *see also Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Claimant also avers that the administrative law judge impermissibly relied on the numerical superiority of the medical opinions that corroborated the opinions of Drs. Selby and Cohen in determining that Dr. Selby's opinion was entitled to determinative weight. Similarly, claimant contends that the administrative law judge failed to consider the numerous problems that affected the credibility of Dr. Selby's opinion: that he relied solely on a negative chest x-ray to opine that pneumoconiosis was absent; that he did not explain his reasons for attributing claimant's lung disease solely to cigarette smoking; and that his diagnosis of an asthmatic condition and his attribution of claimant's pulmonary condition to obesity are not supported by the record.

Assessing which physicians diagnosed the existence of pneumoconiosis, the administrative law judge determined that Dr. Selby's opinion was supported by the well-documented and reasoned opinions of Drs. Renn and Tuteur, while Dr. Cohen's opinion was supported only by his own medical review of the medical evidence. Decision and Order at 12. Contrary to claimant's assertion, the administrative law judge's finding was not based solely on the numerical superiority of the negative medical opinions but rather on his finding that Dr. Selby's opinion was supported by the well reasoned and documented opinions of two other "highly qualified" pulmonologists. Moreover, the administrative law judge assumed that if the opinion of Dr. Selby had not been corroborated by the opinions of Drs. Renn and Tuteur, the opinions of Drs. Selby and Cohen would have been in equipoise, and claimant would have, therefore, failed to satisfy his burden of establishing the existence of pneumoconiosis by a preponderance of the evidence. *See Ondecko, supra*; *Allen v. Union Carbide Corp.*, 8 BLR 1-393, 1-395 (1985) ("preponderance of the evidence is evidence which is of greater weight, or evidence which is more credible and convincing than the evidence which is offered in opposition to it, not necessarily evidence that is numerically superior"; *see also Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Calfee v. Director, OWCP*, 8 BLR 1-7, 1-10 (1985). "[T]o prove by a preponderance of the evidence each element of a claim before an administrative agency, the claimant must present reliable, probative, and substantial evidence of such sufficient quality that a reasonable administrative law judge could conclude that the existence of the facts supporting the claim are more probable than their nonexistence." *U.S. Steel Mining Co., Inc. v. Director, OWCP [Jarrell]*, 187 F.3d 384,

389, 21 BLR 2-639, 2-648 (4th Cir. 1999); *Clinchfield Coal Co. v. Fuller*, 180 F.3d 622, 21 BLR 2-654 (4th Cir. 1999); *see also Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988). We affirm, therefore, the administrative law judge's finding that the opinions of Drs. Selby, Renn, and Tuteur, that claimant did not have coal workers' pneumoconiosis, were well-reasoned, documented, and that they were rendered by highly qualified physicians, and therefore, outweighed the opinion of Dr. Cohen as this determination is rational and supported by substantial evidence, *see Trumbo*, *supra*; *King*, *supra*; *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order at 12, and, thereby, affirm the administrative law judge's finding that the existence of pneumoconiosis was not established by medical opinion evidence at Section 718.202(a)(4).

Consequently, we affirm the administrative law judge's determination that claimant failed to establish the existence of pneumoconiosis by x-ray and medical opinion evidence pursuant to Section 718.202(a)(1) and (4). Further, because the administrative law judge indicated that he had reviewed all the evidence of record in determining that the existence of pneumoconiosis, as essential element of entitlement, was not established, the administrative law judge properly found that claimant could not establish entitlement to benefits. *See* 20 C.F.R. §725.309 (2000); *Spese*, *supra*; *Hess*, *supra*; *Trent*, *supra*; *Perry*, *supra*; Decision and Order at 8, 11, 13.

Accordingly, the Decision and Order - Denying Modification of the administrative law judge is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge