BRB No. 06-0267 BLA

ELLIOTT ROWE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
JOHNSON COAL COMPANY, INCORPORATED	)	
	)	
	)	DATE ISSUED: 01/30/2007
and	)	
	)	
KENTUCKY COAL PRODUCERS' SELF-INSURANCE FUND	)	
	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
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 Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Stephen A. Sanders (Appalachian Research and Defense Fund of Kentucky, Incorporated), Prestonsburg, Kentucky, for claimant.

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

Jeffrey S. Goldberg (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, 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:

Employer appeals the Decision and Order on Remand (1999-BLA-0807) of Administrative Law Judge Joseph E. Kane denying its Petition for Modification of an award of 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). In a Decision and Order issued on January 24, 2003, the Board vacated Administrative Law Judge Richard K. Malamphy's Decision and Order denying modification and remanded the case for reconsideration of the evidence relevant to the existence of pneumoconiosis and total disability due to pneumoconiosis.[1] *Rowe v. Johnson Coal Co.*, BRB No. 02-0366 BLA (Jan. 24, 2003)(unpub.). On remand, Judge Malamphy was unavailable, so the case was reassigned to Judge Kane (the administrative law judge). The administrative law judge denied employer's renewed request to compel claimant to appear for a physical examination and determined that the award of benefits contained no mistake in a determination of fact pursuant to 20 C.F.R. §725.310. Accordingly, the administrative law judge denied employer's petition for modification.

On appeal, employer argues that the administrative law judge erred in denying its request to have claimant examined. Employer also contends that the administrative law judge did not properly weigh the evidence relevant to 20 C.F.R. §§718.202(a)(1), (a)(4), 718.204(b)(2)(ii), (b)(2)(iv), and 718.204(c). Claimant has responded and urges affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has submitted a limited response in which he urges the Board to affirm the administrative law judge's denial of employer's motion to compel an examination of claimant.

This case also includes claimant's counsel's petition for attorney fees in the amount of $4,500 for twenty hours of services billed at an hourly rate of $225. These services were rendered during employer's prior appeal of Judge Malamphy's Decision and Order rejecting its request for modification. Employer has not responded to the fee petition.

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 applicable 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).

[1] The complete procedural history of this case is set forth in the administrative law judge's Decision and Order on Remand. Decision and Order on Remand at 1-4.

We will first address employer's allegations of error regarding the administrative law judge's denial of its motion to compel claimant to appear for a physical examination. Employer first filed a motion to compel shortly after it submitted its petition for modification on June 29, 1998. Director's Exhibit 87. Judge Malamphy denied employer's request and employer did not raise this issue in the subsequent appeals regarding its petition for modification. When the Board last remanded this case, the Office of Administrative Law Judges scheduled a hearing, which had not previously been held in connection with employer's modification request. Employer informed claimant that he was to appear for an examination by Dr. Dahhan. Claimant refused, prompting employer to file a motion to compel a physical examination. At the hearing, the administrative law judge admitted into the record newly submitted medical reports by Drs. Sundaram and Potter, claimant's treating physicians, at claimant's request, and a record review prepared for employer by Dr. Westerfield. The parties discussed employer's motion to compel at the hearing, but the administrative law judge did not make a ruling until he rejected employer's request in his Decision and Order on Remand.

The administrative law judge noted in his Decision and Order that employer was required to demonstrate that its request to have claimant examined was reasonable under the circumstances and that compelling claimant to submit to an examination would be in the interest of justice. The administrative law judge determined that employer did not satisfy either of these prerequisites, as the record already contained eleven reports by doctors who had examined claimant and employer did not respond when Judge Malamphy gave it the opportunity to develop evidence to rebut medical opinion evidence prepared by Dr. Sundaram that was admitted into the record by Judge Malamphy in conjunction with the award of benefits that employer now seeks to modify. Decision and Order on Remand at 5.

Employer argues that the administrative law judge erred in denying its motion to compel on the grounds that employer had the right to respond to claimant's newly submitted evidence pursuant to Section 725.310, which incorporates Section 19(d) of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. §901 *et seq*., and relevant portions of the Administrative Procedure Act (APA), 5 U.S.C. §551 *et seq*. Employer also maintains that published case law from the United States Courts of Appeals supports the principle that a party is entitled to submit evidence in rebuttal of evidence proffered by an opposing party, even if that evidence could have been obtained earlier.

In his response, the Director contends that the administrative law judge provided valid reasons for denying employer's motion and has attached the brief that he filed before the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, in *Caudill v. Cumberland River Coal Co.*, No. 05-03680, 2006 WL 3345416 (6th Cir. Nov. 17, 2006).[2] The Director asserted in *Caudill* that there is nothing in the Act or the

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment occurred in Kentucky. Director's

regulations that gives employers an absolute right to procure a physical examination of a claimant in conjunction with a request for modification. The Director further maintained that disposition of this issue falls within an administrative law judge's discretion.[3]

We concur with the Director's position. Contrary to employer's assertions, the APA does not mandate that the parties to a hearing be allowed discovery in the form of a physical examination, but rather provides that the parties be given an opportunity for "the submission and consideration of facts, arguments, offers of settlement…." 5 U.S.C. §554(c)(1). In addition, the APA is incorporated into the Act only to the extent that the Secretary of Labor (the Secretary) has not promulgated regulations that specify the manner in which a proceeding is to be conducted. 30 U.S.C. §932. With respect to petitions for modification, the Secretary has set forth regulations detailing the appropriate procedure, which now specify the types and amount of evidence that parties may submit. *See* 20 C.F.R. §725.310. Similarly, Section 19 of the LHWCA, does not give employers the right to require that a miner submit to an examination, but rather allows the district director to compel a physical examination in order to protect the interests of the Black Lung Disability Trust Fund, which is administered by the Department of Labor. *See* 30 U.S.C. §932(a), 33 U.S.C. §919(h).

Finally, the regulations implementing the Act also do not give employer the power to require that the miner submit to an examination on modification. As employer has noted, Section 725.310(b) provides that modification proceedings "shall be conducted in accordance with the provisions of [20 C.F.R. Part 725]." 20 C.F.R. §725.310(b). Section 725.310(b) also sets forth the amount and type of affirmative evidence that the parties may submit on modification, but does not indicate that the parties have a right to compel discovery from an opposing party in order to obtain such evidence. Employer's assertion that Section 725.414 requires the miner to appear for an examination by a physician of employer's choosing is also without merit. Section 725.310(b) limits the application of Section 725.414 to the amount and type of rebuttal evidence that the parties may submit in response to the affirmative evidence submitted in conjunction with a request for modification.[4]

Exhibits 1, 2; *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989).

[3]The Sixth Circuit affirmed the Board's Decision and Order affirming the administrative law judge's denial of an employer's motion to compel an examination of a claimant in conjunction with the employer's request for modification. *Caudill v. Cumberland River Coal Co.*, No. 05-03680, 2006 WL 3345416 (6th Cir. Nov. 17, 2006).

[4] Because this case arises within the jurisdiction of the Sixth Circuit, we decline to concur with employer's request and apply the decision of the United States Court of Appeals for the Seventh Circuit in *Old Ben Coal Co. v. Director, OWCP [Hilliard]*, 292 F.3d 533, 22 BLR 2-429 (7th Cir. 2002)(Pursuant to 20 C.F.R. §§725.310 and 725.414, an employer is entitled to a new physical examination of a miner on modification). *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989).

In the absence of statutory or regulatory provisions authorizing an employer to compel a miner to appear for a physical examination in conjunction with a modification proceeding, whether an employer's request for a new examination is appropriate in a particular case is an issue that falls within the discretion of the administrative law judge. *See Stiltner v. Wellmore Coal Corp.*, 22 BLR 1-37 (2000)(*en banc*); *Selak v. Wyoming Pocahontas Land Co.*, 21 BLR 1-173 (1999). We hold, in the present case, that the administrative law judge did not abuse his discretion in denying employer's motion to compel an examination of claimant. The administrative law judge rationally determined that another examination of claimant was not reasonable or in the interest of justice in light of the fact that the record contains eleven reports of physical examinations of claimant. Decision and Order on Remand at 5; *Stiltner*, 22 BLR 1-37; *Selak*, 21 BLR 1-173.

We will now address employer's allegations of error regarding the administrative law judge's weighing of the medical evidence. Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge considered all of the x-ray readings of record and determined that the interpretations of x-rays taken during claimant's hospitalizations were entitled to little weight because they were not read for the presence or absence of pneumoconiosis. The administrative law judge placed greater weight on the interpretations of the more recent films, noting in particular that the four readings of the most recent x-rays, obtained in 2003, were positive. The administrative law judge concluded that the positive readings by "highly qualified physicians" outweighed the negative readings of record. Decision and Order on Remand at 8. In so doing, the administrative law judge found that 0/1 readings of x-rays predating 1992 "lessen the weight I accord to the negative readings by highly qualified physicians because they noted some changes present on the x-ray films." *Id*.

Employer argues that the administrative law judge erred in finding that the readings of the x-rays obtained during claimant's hospitalizations were entitled to little weight and in relying on a numerical calculation of the evidence. Employer also contends that the administrative law judge erred in treating 0/1 readings as supportive of a finding of pneumoconiosis and in giving additional weight to readings of the more recent x-rays of record.

Upon review of the administrative law judge's findings, the relevant evidence, and employer's allegations of error, we hold that the administrative law judge rationally determined that the existence of pneumoconiosis was established under Section 718.202(a)(1). Contrary to employer's assertion, the administrative law judge did not rely solely on a numerical analysis of the evidence. Rather, the administrative law judge rationally found that the interpretations of the more recent x-ray evidence and the readings by physicians who are B readers and/or Board-certified radiologists were entitled to the greatest weight. *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Worhach v. Director*, OWCP, 17 BLR 1-105 (1993); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990). The administrative law judge also acted within his discretion in giving more weight to the readings of the most recent x-rays, as the record reflects that there was a shift from mixed

positive and negative readings to predominantly positive readings over time. *See Woodward*, 991 F.2d 314, 17 BLR 2-77. The administrative law judge's determination that the readings of the x-rays taken while claimant was hospitalized were entitled to little weight was rational, as absent ILO classifications, these x-ray readings are not probative evidence under Section 718.202(a)(1). 20 C.F.R. §§718.102, 718.202(a)(1).

With respect to the allegation of error regarding the administrative law judge's treatment of the 0/1 x-ray readings, in light of the provision set forth in Section 718.102(b), that such interpretations are not to be considered evidence of pneumoconiosis, the administrative law judge's decision to rely upon the 0/1 readings to discredit completely negative interpretations was not in accordance with law. However, because the administrative law judge provided a valid alternative rationale for his ultimate conclusion that the x-ray evidence supported a finding of pneumoconiosis, his finding that Judge Malamphy's finding of pneumoconiosis at Section 718.202(a)(1) did not contain a mistake of fact is affirmed. *Searls v. Southern Ohio Coal Co.*, 11 BLR 1-161 (1988); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

When considering the evidence relevant to Section 718.202(a)(4), the administrative law judge discredited the medical opinions of Drs. Williams, Lane, Wright, Jarboe, Dineen, and Fino because, contrary to his finding at Section 718.202(a)(1), these physicians found that the x-ray evidence was negative for pneumoconiosis. The administrative law judge determined that Dr. Westerfield's opinion was entitled to little weight, as it is contradictory. The administrative law judge found that the opinions in which Drs. Anderson, Broudy, Baker, Sundaram and Potter diagnosed pneumoconiosis are well documented and well reasoned. Based upon their status as treating physicians, the administrative law judge accorded greater weight to the opinions of Drs. Sundaram and Potter and concluded that they were sufficient to establish the existence of pneumoconiosis. The administrative law judge found, therefore, that the award of benefits did not contain a mistake of fact at Section 718.202(a)(4). Decision and Order on Remand at 15-16.

Employer argues that the administrative law judge's finding at Section 718.202(a)(4) must be vacated because the administrative law judge relied on his erroneous findings at Section 718.202(a)(1) to discredit the opinions of the physicians who did not diagnose pneumoconiosis by x-ray. Employer also contends that the administrative law judge erred in giving greater weight to the opinions of Drs. Sundaram and Potter merely because they treated claimant.

Employer has not identified any error requiring remand in the administrative law judge's finding under Section 718.202(a)(4). Because we have affirmed the administrative law judge's finding that the x-ray evidence is sufficient to establish the existence of pneumoconiosis, we hold that the administrative law judge acted within his discretion in giving less weight to the opinions in which the physicians stated that the x-rays are not consistent with pneumoconiosis. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 514, 22 BLR 2-625, 2-648-49 (6th Cir. 2003); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-

111, 1-113 (1989). Because we have affirmed the administrative law judge's decision to discredit the reports of those physicians who did not diagnose pneumoconiosis, we need not address employer's argument concerning the administrative law judge's weighing of the opinions of Drs. Sundaram and Potter. Employer bears the burden of establishing that the prior finding of pneumoconiosis at Section 718.202(a)(4) contained a mistake in a determination of fact. *See King v. Jericol Mining, Inc.*, 246 F.3d 822, 22 BLR 2-305 (6th Cir. 2001). In light of the fact that the administrative law judge provided a valid rationale for discrediting the opinions in which the physicians did not diagnose clinical pneumoconiosis, the administrative law judge's finding of no mistake of fact at Section 718.202(a)(4) is affirmed. Thus, error, if any, in the administrative law judge's treatment of the opinions of Drs. Sundaram and Potter is harmless. *Searls*, 11 BLR 1-161; *Kozele*, 6 BLR 1-378.

Pursuant to 20 C.F.R. §718.204(b)(2), the administrative law judge essentially determined that claimant's numerous recent hospitalizations for treatment of bronchitis and pneumonia constitute evidence sufficient to establish that he is suffering from a totally disabling pulmonary impairment and provide support for the opinions in which Drs. Sundaram and Potter indicate that claimant is totally disabled. The administrative law judge also determined that Dr. Westerfield's opinion corroborated the diagnoses of total disability made by Drs. Sundaram and Potter. The administrative law judge also relied upon the sole post-exercise blood gas study (BGS) of record, dated May 8, 1989, finding that it produced qualifying values. Decision and Order on Remand at 17-18; Director's Exhibit 11; Claimant's Exhibits 1-7, 10.

Employer argues that the administrative law judge erred in finding total disability established at Section 718.204(b)(2)(ii) based upon a single qualifying BGS. Employer also contends that under Section 718.204(b)(2)(iv), the administrative law judge mischaracterized Dr. Westerfield's opinion and erred in treating the opinions of Drs. Sundaram and Potter as reasoned and documented on the issue of total disability.

Employer's allegations of error have merit. We note that the exercise BGS did not produce qualifying values, a fact that the Board pointed out to Judge Malamphy in its 1996 Decision and Order remanding the case to him. *Rowe v. Johnson Coal Co., Inc.*, BRB No. 95-1407 BLA, slip op. at 4 n. 4 (Sept. 19, 1996)(unpub.), *citing Tucker v. Director, OWCP*, 10 BLR 1-35 (1987). In addition, the administrative law judge stated that the exercise BGS supported a finding of total disability because "several physicians stated this qualifying test would indicate the miner would be unable to perform heavy manual labor such as coal mine employment." Decision and Order on Remand at 17. The administrative law judge did not, however, weigh this evidence against the opinions of Drs. Broudy, Jarboe, Dineen, and Westerfield that the objective evidence from the same general time period in which the exercise BGS was obtained did not support a diagnosis of a totally disabling respiratory or pulmonary impairment.

Employer is also correct in asserting that the administrative law judge did not properly determine that Dr. Westerfield's opinion corroborates the opinions of Drs. Sundaram and Potter on the issue of total disability. Dr. Westerfield indicated in his most recent report that because the newly submitted evidence only contained an invalid pulmonary function study, he could not form an opinion as to the extent, if any, of claimant's respiratory or pulmonary disability. Employer's Exhibit 6. With respect to the previously submitted evidence, Dr. Westerfield indicated that claimant was not totally disabled. Director's Exhibits 85, 88; Employer's Exhibit 3.

Employer is also correct in maintaining that the administrative law judge did not adequately explain how the hospital records supported a finding that claimant is suffering from a permanent total respiratory or pulmonary disability, in contrast to a series of acute episodes of respiratory illness, as the administrative law judge did not identify the specific evidence that is consistent with this finding. *See* Decision and Order on Remand at 17. Because the administrative law judge did not accurately characterize the evidence, did not weigh all of the relevant evidence, and did not provide a sufficient rationale for each of his findings, we must vacate his determination that the prior finding of total disability under Section 718.204(b)(2) did not contain a mistake in a determination of fact. *Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Tackett v. Director, OWCP*, 7 BLR 1-703, 1-705 (1985). On remand, the administrative law judge must reconsider this issue and set forth his findings, including the underlying rationale, with respect to whether the relevant medical evidence establishes that there was a mistake in Judge Malamphy's prior determination that claimant is suffering from a permanent, totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(b)(2).

Upon weighing the evidence under 20 C.F.R. §718.204(c), the administrative law judge gave greatest weight to the opinions in which Drs. Sundaram and Potter attributed claimant's total disability to coal dust exposure and concluded that they were sufficient to establish that claimant is totally disabled due, at least in part, to pneumoconiosis. Decision and Order on Remand at 18-19. Employer argues that the administrative law judge erred in discrediting the opinions of Drs. Fino, Anderson, Myers, Lane, Broudy, Wright, Jarboe, Baker and Dineen based upon his erroneous findings at Section 718.202(a)(1). Employer also maintains that the administrative law judge erred in finding that Dr. Westerfield's opinion was entitled to little weight under Section 718.204(c) because his opinion regarding the presence of clinical pneumoconiosis was contradictory.

We do not find merit in employer's first contention, as the administrative law judge's finding that the x-ray evidence is sufficient to establish the existence of clinical pneumoconiosis has been affirmed. With respect to the administrative law judge's treatment of Dr. Westerfield's opinion, however, employer's allegation of error is well-founded. As employer asserts, Dr. Westerfield acknowledged in his most recent opinion that claimant has a pulmonary disease and stated that, even assuming that claimant has simple pneumoconiosis,

his pulmonary condition is not related to pneumoconiosis or dust exposure in coal mine employment. Because Dr. Westerfield relied upon assumptions that are consistent with the administrative law judge's findings, his opinion is relevant to the issue of total disability causation. *Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001); *Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997). We must vacate, therefore, the administrative law judge's finding that the prior finding at Section 718.204(c) did not contain a mistake in a determination of fact. The administrative law judge must reconsider this issue on remand.

Finally, we address claimant's counsel's petition for attorney fees for services rendered when this case was last before the Board. Employer has not responded to the fee petition. We grant counsel's request for a fee of $4,500 for twenty hours of service billed at an hourly rate of $225, as the fee is reasonably commensurate with the necessary work performed, the quality of the representation, the complexity of the legal issues involved, and the amount of benefits awarded. 20 C.F.R. §802.203(e). This fee award is not enforceable, however, unless and until claimant prevails. 20 C.F.R. §802.203(a)-(c); *Bryant v. Lambert Coal Co.*, 9 BLR 1-166 (1986); *see also Wells v. Director, OWCP*, 9 BLR 1-63 (1986).

Accordingly, the administrative law judge's Decision and Order on Remand is affirmed in part and vacated in part, and this case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge