BRB No. 07-0283 BLA

F.J.O.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	DATE ISSUED: 01/29/2008
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
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 Modification Denying Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith (Rundle and Rundle, L.C.), Pineville, West Virginia, for claimant.[1]

Laura Metcoff Klaus (Greenberg Traurig L.L.P.), Washington, D.C., for employer.

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

PER CURIAM:

[1] Counsel has withdrawn from representing claimant, after filing his brief on appeal.

Claimant appeals the Decision and Order on Modification Denying Benefits (2005-BLA-5139) of Administrative Law Judge Richard A. Morgan (the administrative law judge) 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). The administrative law judge credited claimant with twenty-five years of qualifying coal mine employment, as stipulated by the parties, and adjudicated this claim, filed on July 2, 2001, pursuant to the regulatory provisions at 20 C.F.R. Part 718. The administrative law judge determined that Administrative Law Judge Daniel L. Leland issued a Decision and Order on January 8, 2004, finding that claimant established total respiratory disability but failed to establish the existence of pneumoconiosis. Following claimant's request for modification and submission of additional evidence, the administrative law judge found that there was no mistake in a determination of fact in Judge Leland's denial of benefits. The administrative law judge further found that the weight of the evidence, old and new, was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), and thus claimant had failed to establish a change in conditions to support modification pursuant to 20 C.F.R. §725.310. Accordingly, benefits were denied.

On appeal claimant contends that the administrative law judge failed to properly weigh the medical opinions of record pursuant to 20 C.F.R. §718.202(a)(4). Employer has responded, urging affirmance, and the Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.[2]

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 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 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

In reviewing the record as a whole on modification, an administrative law judge is authorized "to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 257 (1971). In considering whether a claimant has established a change in conditions pursuant to 20 C.F.R. §725.310, an administrative law judge is obligated to perform an independent assessment of the newly submitted evidence, considered in conjunction with the previously submitted evidence, to determine if the weight of the new evidence is sufficient to establish at least

[2] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

one element of entitlement which defeated entitlement in the prior decision. *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992).

Claimant contends that the administrative law judge erred in crediting the opinions of employer's physicians over the contrary opinion of Dr. Rasmussen in finding that pneumoconiosis was not established at Section 718.204(a)(4). Claimant asserts that Dr. Zaldivar provided contradictory assessments of claimant's condition, and that employer's physicians based their conclusions on negative x-ray evidence rather than on all relevant evidence. Claimant maintains that Dr. Rasmussen provided the only reasoned medical opinion of record after considering all relevant evidence, and that his opinion is sufficient to establish entitlement. Claimant's arguments are without merit.

In finding that claimant failed to establish the existence of pneumoconiosis at Section 718.202(a)(4), the administrative law judge accurately set forth the conflicting medical opinions of record, *see* Decision and Order at 7-9, and determined that Dr. Rasmussen's rationale for diagnosing legal pneumoconiosis was premised on medical studies showing that negative x-rays did not rule out the presence of pneumoconiosis and that chronic obstructive pulmonary disease may be caused by coal dust exposure independent of any history of cigarette smoking.[3] Decision and Order at 9, 15; Director's Exhibit 38. While noting that these medical theories were undisputed, the administrative law judge acted within his discretion in discounting Dr. Rasmussen's opinion because he found that the physician failed to explain how the theories related to the facts of this particular claimant's case, and because Dr. Rasmussen did not provide specific evidentiary support for his conclusions. Decision and Order at 15; *see generally Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5 (1985).

The administrative law judge then properly assessed the credibility of the contrary opinions of Drs. Forehand,[4] Branscomb,[5] Zaldivar,[6] and Tuteur[7] in light of each

[3] Dr. Rasmussen's March 12, 2003 report explained that chest x-rays were imperfect in determining the presence or absence of pneumoconiosis, and that chronic obstructive lung disease could result from coal dust exposure absent x-ray changes of pneumoconiosis. Director's Exhibit 38. After citing medical studies in support of these theories, Dr. Rasmussen indicated that, "[b]ased on all of the large body of medical evidence, it must be concluded that [the miner's] disabling lung disease is the consequence both of his cigarette smoking and his coal mine dust exposure regardless of the x-ray findings." Director's Exhibit 38 at 4.

[4] Dr. Forehand examined claimant on September 26, 2001. Based on an arterial blood gas test, a pulmonary function test, and a negative chest x-ray, Dr. Forehand

physician's credentials, documentation and reasoning, and permissibly concluded that only Dr. Tuteur provided a well-reasoned opinion that was entitled to full weight at Section 718.202(a)(4). Decision and Order at 15; *see Milburn Colliery Co. v. Hicks*, 138

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diagnosed chronic bronchitis due to cigarette smoking and concluded that claimant was totally disabled due solely to cigarette smoking. Director's Exhibit 8. The administrative law judge discredited Dr. Forehand's opinion because he found that it failed to explain why smoking, as opposed to coal dust exposure, caused claimant's condition. Decision and Order at 14-15.

[5] Dr. Branscomb reviewed claimant's medical records, many of which were not included in the evidentiary record of this case, and concluded that claimant had asthma. He also found that claimant's pulmonary disease was in no way caused or aggravated by coal dust exposure. Director's Exhibit 35. The administrative law judge found that Dr. Branscomb's opinion was entitled to little weight because it was "impossible to determine what his opinion is when considering only the evidence in the court record." Decision and Order at 15.

[6] Dr. Zaldivar examined claimant on November 14, 2001 and prepared a report dated December 26, 2001, in which he found that claimant had radiographic evidence of pneumoconiosis. At his May 10, 2006 deposition, Dr. Zaldivar testified that claimant had an obstructive impairment, but explained it was consistent with asthma. Based on a pulmonary function study and a blood gas test that were within normal limits, he diagnosed claimant with asthma and emphysema unrelated to coal dust exposure. Dr. Zaldivar explained that claimant's lungs revealed bullae that were typical of smoker's emphysema rather than coal workers' pneumoconiosis. Director's Exhibit 37; Employer's Exhibit 6. The administrative law judge found that Dr. Zaldivar's report and deposition testimony conflicted as to the presence of pneumoconiosis and were, therefore, entitled to little weight. Decision and Order at 15.

[7] Dr. Tuteur was deposed on May 9, 2006. After reviewing claimant's medical records, Dr. Tuteur concluded that claimant had chronic obstructive pulmonary disease based on claimant's "exercise intolerance, chronic daily productive cough, occasional wheezing, physical exam…[and had] a severe obstructive abnormality, no restrictive abnormality and impairment of gas exchange that worsens during exercise on several, but not all occasions." Employer's Exhibit 5 at 12-13. Dr. Tuteur testified that there were several potential contributing causes of claimant's chronic obstructive pulmonary disease, *i.e.*, cigarette smoking, gastroesophageal reflux disease with hiatus hernia, asthma and coal dust exposure. However, Dr. Tuteur concluded that the combination of the tobacco smoke, reflux disease and childhood asthma, but not coal dust exposure, caused claimant's chronic obstructive pulmonary disease. Employer's Exhibit 5 at 16-18.

F.3d 524, 533, 21 BLR 2-323, 2-335 (4th. Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997). In so finding, the administrative law judge was persuaded by Dr. Tuteur's explanation of claimant's symptoms and the rationale he provided for concluding that smoking, reflux disease and childhood asthma were the only contributing causes of claimant's respiratory condition, as supported by his underlying pulmonary function studies, arterial blood gas studies, and claimant's daily symptoms. *Id*; *see Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark*, 12 BLR 1-149; *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985); *Lucostic*, 8 BLR 1-46.

It is within the administrative law judge's discretion, as the trier-of-fact, to determine the weight and credibility to be accorded the medical experts, *see Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *Sisak v. Helen Mining Co.*, 7 BLR 1-178, 1-181 (1994), and to assess the evidence of record and draw his own conclusions and inferences therefrom. *See Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1089); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). It is within the administrative law judge's discretion to determine whether an opinion is reasoned, *see Hicks*, 138 F.3d at 536, 21 BLR at 2-334; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *Clark*, 12 BLR at 1-149; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic*, 8 BLR at 1-46, and the Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge, *see Anderson*, 12 BLR at 1-113. As substantial evidence supports the administrative law judge's weighing of the medical opinions, we affirm his finding that claimant failed to establish the existence of pneumoconiosis at Section 718.202(a)(4).

Considering the x-ray and medical opinion evidence together, consistent with *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), the administrative law judge properly found that claimant failed to meet his burden of establishing the existence of pneumoconiosis at Section 718.202(a)(1)-(4). Decision and Order at 15; *see Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994). Thus, we affirm the administrative law judge's finding that claimant failed to establish either a mistake in a determination of fact or a change in conditions sufficient to support modification pursuant to Section 725.310. *O'Keeffe*, 404 U.S. at 257; *Nataloni*, 17 BLR 1-82; *Kovac*, 14 BLR 1-156, 1-71.

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge