BRB No. 07-0366 BLA

J.S.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WHITAKER COAL CORPORATION	)	DATE ISSUED: 01/18/2008
	)	
and	)	
	)	
SUN COAL COMPANY c/o ACORDIA EMPLOYERS SERVICE	)	
	)	
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 Denying Benefits of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Edmond Collett (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

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

Richard A. Seid (Gregory F. Jacob, 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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2005-BLA-5347) of Administrative Law Judge Ralph A. Romano (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).[1] The administrative law judge credited claimant with twenty years of coal mine employment, pursuant to the parties' stipulation, and considered claimant's request for modification of a Decision and

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[1] Claimant filed an initial claim for black lung benefits on August 23, 1993. He filed a second claim on September 20, 1993, while the first one was pending. After an informal conference, the district director denied benefits on August 1, 1995, as claimant did not establish any elements of entitlement. On July 26, 1996, claimant submitted additional evidence and requested modification of the denial. After a formal hearing, Administrative Law Judge Daniel J. Roketenetz denied the claim. *[J.S.] v. Whitaker Coal Corp.*, 97-BLA-00610 (Apr. 4, 1998). On appeal, the Board affirmed the denial of benefits. *[J.S.] v. Whitaker Coal Corp.*, BRB No. 98-0992 BLA (April 28, 1999)(unpublished).

On June 9, 1999, claimant filed a second request for modification. The district director denied the request on October 6, 1999. Claimant requested a formal hearing, after which Administrative Law Judge Thomas F. Phalen declined to modify the prior denial, finding no mistake in fact or change in conditions established. *[J.S.] v. Whitaker Coal Corp.*, 2000-BLA-00363 (January 12, 2001). Claimant appealed to the Board, but while the appeal was pending, claimant moved to withdraw his claim. The Board remanded the claim to the district director to consider claimant's request, and on May 7, 2001, the district director granted claimant's request for withdrawal.

Claimant filed his current application for benefits on June 19, 2001, which the district director denied. Director's Exhibit 2. Employer objected to the district director's earlier order permitting withdrawal of the 1993 claim, citing the Board's holdings in *Lester v. Peabody Coal Co.*, 22 BLR 1-183, 1-191 (2002)(*en banc*), and *Clevenger v. Mary Helen Coal Co.*, 22 BLR 1-193, 1-200 (2002)(*en banc*)(deferring to the Director's interpretation that upon the date that a decision on the merits becomes effective, authority to allow withdrawal of the claim is terminated). At employer's request, Administrative Law Judge Joseph E. Kane issued an order remanding the case to the district director to reconsider the withdrawal determination. Director's Exhibit 32. The district director concluded that the withdrawal order was invalid and, therefore, that the June 19, 2001 application was, in fact, a request for modification. After denying the modification request, the district director forwarded the claim for a formal hearing, which was held on May 23, 2006, before Administrative Law Judge Ralph A. Romano (the administrative law judge).

Order denying benefits issued by Administrative Law Judge Thomas F. Phalen on January 12, 2001. The administrative law judge found that claimant did not establish a change in conditions under 20 C.F.R. §725.310 (2000), as the evidence submitted since the denial of benefits was insufficient to prove either the existence of pneumoconiosis or total disability due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a) and 718.204(b)(2), (c).[2] The administrative law judge also determined that there was no mistake of fact in the prior denial of benefits and, thus, concluded that claimant failed to establish the prerequisites for modification pursuant to Section 725.310 (2000). Accordingly, he denied benefits.

On appeal, claimant contends that the administrative law judge erred in failing to find the existence of pneumoconiosis established pursuant to Section 718.202(a)(1) and (a)(4). Additionally, claimant contends that the administrative law judge erred in finding that claimant did not establish total respiratory disability under Section 718.204(c)(4) (2000) based on the medical opinion evidence.[3] Claimant further asserts that because the administrative law judge found that Dr. Hussain's opinion was not credible, the Director, Office of Workers' Compensation Programs (the Director), failed to provide claimant with a complete and credible pulmonary evaluation, as required under the Act. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director has filed a limited response, arguing that remand for a complete pulmonary evaluation is not needed in this case.[4]

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[2] As this claim was pending on January 19, 2001, the administrative law judge correctly applied the regulation found at 20 C.F.R. §725.310 (2000), rather than the amended version of the regulation. 20 C.F.R. §725.2.

[3] We note that claimant refers to the administrative law judge's weighing of the medical opinion evidence relevant to the existence of a totally disabling respiratory impairment under 20 C.F.R. §718.204(c). When the Department of Labor amended the regulations appearing in Part 718, the regulation applicable to proof of total disability was shifted from Section 718.204(c) to 20 C.F.R. §718.204(b)(2). In this case, the administrative law judge properly addressed whether claimant is totally disabled under Section 718.204(b)(2).

[4] Claimant does not challenge the administrative law judge's findings that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2) and (a)(3), and total disability at 20 C.F.R. §718.204(b)(2)(i)-(iii). Claimant also has not alleged any error in the administrative law judge's finding that the prior denial contained no mistake in a determination of fact at 20 C.F.R. §725.310 (2000). We affirm these findings as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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, 363 (1965).

In order to establish the prerequisites for modification, claimant must demonstrate a change in conditions or a mistake in a determination of fact. 20 C.F.R. §725.310 (2000); *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230-231, 18 BLR 2-290, 2-294 (6th Cir. 1994).[5] The Board has held that in considering whether a claimant has established a change in conditions at Section 725.310 (2000), 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 one element of entitlement which defeated entitlement in the prior decision. *Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-6, 1-11 (1994); *Nataloni v. Director, OWCP*, 17 BLR 1-82, 1-84 (1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156, 1-158 (1990), *modified on recon.*, 16 BLR 1-71 (1992). In his January 12, 2001 Decision and Order denying benefits, Judge Phalen found that the evidence was insufficient to establish either the existence of pneumoconiosis or total disability. Consequently, in order to establish a change in conditions pursuant to Section 725.310 (2000), claimant was required to establish, based on the newly submitted evidence, that he suffers from pneumoconiosis or that he is totally disabled by a respiratory or pulmonary impairment. *Worrell*, 27 F.3d at 230-231, 18 BLR at 2-294**;** *Kingery*, 19 BLR at 1-11; *Nataloni*, 17 BLR at 1-84; *Kovac*, 14 BLR at 1-158.

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and does not contain reversible error.

Claimant contends that the administrative law judge erred in finding the x-ray evidence insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). The administrative law judge considered eight interpretations of four x-rays. Decision and Order at 6. The administrative law judge found that the July 16, 1996 x-ray was positive based upon the uncontradicted positive reading of Dr. Clarke. *Id.* The administrative law judge determined that the September 19, 2001 x-ray was negative for pneumoconiosis, as the negative interpretations of Dr. Scott, a dually qualified Board-

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as claimant was employed in the coal mine industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibits 2, 7.

certified radiologist and B reader, and Dr. Vuskovich, a B reader, outweighed the positive reading submitted by Dr. Hussain, who has no special radiological qualifications. Decision and Order at 7. The administrative law judge considered the conflicting interpretations of the August 5, 2002 x-ray, and found that the negative interpretations rendered by Dr. Halbert, a dually qualified physician, and Dr. Dahhan, a B reader, outweighed the positive interpretation rendered by Dr. Alexander, who is also dually qualified. *Id.* The administrative law judge concluded, therefore, that the August 5, 2002 film was negative for pneumoconiosis. The administrative law judge found that the x-ray obtained on February 19, 2004 x-ray was negative based upon Dr. Halbert's uncontradicted negative interpretation. *Id.* Considering the x-rays together, the administrative law judge found that "the weight of the x-ray evidence does not support a finding of the presence of pneumoconiosis." *Id.*

Claimant contends that the administrative law judge erred in considering the qualifications of the physicians in weighing the x-ray evidence, in placing substantial weight on the numerical superiority of the x-ray readings, and in selectively analyzing the x-ray evidence. Claimant's Brief at 3. Contrary to claimant's assertion, the administrative law judge acted in accordance with law in assessing the relative radiological qualifications of the physicians interpreting the x-rays. 20 C.F.R. §718.202(a)(1); *see Johnson v. Island Creek Coal Co.*, 846 F.2d 364, 366, 11 BLR 2-161, 2-163 (6th Cir. 1988); *Creech v. Benefits Review Board*, 841 F.2d 706, 709, 11 BLR 2-86, 2-90 (6th Cir. 1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211, 1-212-213 (1985). Similarly, because the administrative law judge considered the x-ray readers' qualifications in conjunction with the interpretations offered by the readers, he did not rely solely on the numerical superiority of the negative interpretations in rendering his finding. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279 (6th Cir. 1995). Additionally, although claimant suggests that the administrative law judge "may have 'selectively analyzed'…" the x-ray evidence, he does not attempt to substantiate that charge.[6] Claimant's Brief at 3; *see White v. New White Coal Co., Inc.*, 23 BLR 1-1, 1-4 (2004); *see generally Cox v. Director, OWCP*, 791 F.2d 445, 447, 9 BLR 2-46, 2-47-48 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983).

[6] Employer's contention that the administrative law judge erred in treating Dr. Clarke's x-ray interpretation as new medical evidence in determining whether a change in conditions was established has merit, because the x-ray read by Dr. Clarke predated the prior denial of benefits. Any error is harmless, however, in light of the administrative law judge's rational determination that the preponderance of the newly submitted x-ray evidence was negative for pneumoconiosis. *See Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230-231, 18 BLR 2-290, 2-294 (6th Cir. 1994); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Claimant further asserts that the administrative law judge erred by failing to find the existence of pneumoconiosis established, based upon the medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(4). Claimant specifically contends that the administrative law judge erred in rejecting Dr. Clarke's opinion finding the existence of pneumoconiosis. Claimant asserts that because Dr. Clarke's diagnosis of pneumoconiosis was based on a physical examination, medical and work histories, a pulmonary function study, and an arterial blood gas study, in addition to a positive x-ray, the physician's opinion was documented and reasoned, and should, therefore, have been credited by the administrative law judge. Claimant's Brief at 4-5. Claimant further argues that the administrative law judge erred by substituting his own opinion for that of Dr. Clarke.

Claimant has not identified any error in the administrative law judge's finding under Section 718.202(a)(4) that requires remand. As employer has indicated, Dr. Clarke's opinion cannot establish a change in conditions as it predates the prior denial of benefits. Moreover, the administrative law judge acted within his discretion in according greatest weight to Dr. Dahhan's opinion, that claimant does not have pneumoconiosis, based upon his qualifications as a Board-certified pulmonologist, and the fact that Dr. Dahhan had a more thorough understanding of claimant's medical history. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Trumbo v. Director, OWCP*, 17 BLR 1-85, 1-89 n.4 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67, 1-68 (1986); *Lucostic v. Director, OWCP*, 8 BLR 1-46, 1-47 (1985). We therefore affirm the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4).

With respect to the issue of total disability, claimant generally contends that the administrative law judge erred in finding that claimant was not totally disabled pursuant to Section 718.204(c)(4)(2000). The only specific error that claimant alleges, however, is that the administrative law judge improperly rejected Dr. Clarke's medical opinion, which, claimant contends, was well reasoned, well documented, and sufficient to establish that claimant is totally disabled. Claimant argues that the administrative law judge erred by failing to consider the exertional requirements of claimant's usual coal mine work in conjunction with Dr. Clarke's medical opinion of claimant's disability. Claimant's allegations of error are not relevant to the administrative law judge's finding that claimant failed to establish a change in conditions with respect to the issue of total disability, however, as Dr. Clarke's opinion predates the prior denial of benefits and, thus, cannot establish a change in conditions. Furthermore, the administrative law judge permissibly found that Dr. Clarke's opinion, that claimant was totally disabled by moderate restrictive and chronic obstructive pulmonary disease, was entitled to little weight on the grounds that the physician relied, at least in part, on a July 16, 1996 pulmonary function test that the administrative law judge found was invalid and he did

not explain how the medical evidence supported his conclusion. *See Clark*, 12 BLR at 1-155; *Fields*, 10 BLR at 1-21*; Lucostic*, 8 BLR at 1-47. We affirm, therefore, the administrative law judge's finding that the newly submitted medical opinion evidence is insufficient to establish total disability pursuant to Section 718.204(b)(2)(iv).

Lastly, claimant argues that because the administrative law judge concluded that Dr. Hussain's report was unreasoned and undocumented with respect to the issue of the existence of pneumoconiosis, the Director did not provide claimant with a complete and credible pulmonary evaluation sufficient to substantiate his claim. In response to claimant's assertion, the Director contends that claimant's argument rests on an erroneous premise, as the Director is required only to obtain a complete examination, not the dispositive evidence that results in an award of benefits.

Pursuant to Section 413(b) of the Act, "[e]ach miner who files a claim for benefits under this subchapter shall upon request be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation." 30 U.S.C. §923(b); *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-89-90 (1994). The regulation at 20 C.F.R. §725.406(a) provides that "[a] complete pulmonary evaluation includes a report of physical examination, a pulmonary function study, a chest roentgenogram and, unless medically contraindicated, a blood gas study." 20 C.F.R. §725.406(a).

The record reflects that Dr. Hussain conducted an examination and the full range of testing required by the regulations, and addressed each element of entitlement on the Department of Labor examination form. Director's Exhibit 10; 20 C.F.R. §§718.101(a), 718.104, 725.406(a). The administrative law judge did not find, nor does claimant contend, that Dr. Hussain's opinion was incomplete because it failed to address one of the essential elements of entitlement. Rather, claimant contends that the Director failed to provide a complete, credible pulmonary evaluation because the administrative law judge did not credit Dr. Hussain's opinion regarding the existence of pneumoconiosis. We reject claimant's contentions. In *Gallaher v. Bellaire Corp.*, No. 03-3066, 71 Fed. Appx. 528, 531, 2003 WL 21801463 (6th Cir. Aug. 4, 2003)(unpublished), the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, held that the Director had discharged his responsibility to provide a complete pulmonary evaluation because the doctor's report at issue addressed the essential elements of entitlement, even though the administrative law judge had discredited the doctor's diagnosis of pneumoconiosis as unexplained and based on a questionable x-ray interpretation. In keeping with the reasoning of *Gallaher*, which involves facts essentially identical to those presented in the instant case, and Dr. Hussain's opinion which addressed all of the essential elements of entitlement, Director's Exhibit 10, we reject claimant's argument that the Director failed to provide him with a full pulmonary evaluation. *Cf. Hodges v. BethEnergy Mines*, 18 BLR at 1-89-90.

As the administrative law judge permissibly concluded that the newly submitted evidence does not establish the existence of pneumoconiosis or total disability, claimant has not met his burden of establishing a change in conditions. *See Worrell*, 27 F.3d at 230-231, 18 BLR at 2-294**;** *Kingery*, 19 BLR at 1-11; *Nataloni*, 17 BLR at 1-84; *Kovac*, 14 BLR at 1-158; *Clark*, 12 BLR at 1-155; *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2. We affirm, therefore, the administrative law judge's finding that claimant failed to establish the prerequisites for modification under Section 725.310 (2000). *Id.*

Accordingly, the administrative law judge's Decision and Order 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