BRB No. 11-0296 BLA

MALCOLM MORGAN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WHITAKER COAL CORPORATION	)	DATE ISSUED: 01/20/2012
	)	
and	)	
	)	
SUN COAL COMPANY, INCORPORATED	)	
	)	
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 Denial of Benefits of John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

Phyllis L. Robinson, Manchester, Kentucky, for claimant.

Ronald E. Gilbertson (Husch Blackwell LLP), Washington, D.C., for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Modification Denial of Benefits (2009-BLA-5931) of Administrative Law Judge John P. Sellers, III, rendered on a claim filed pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C.

§§921(c)(4) and 932(*l*)) (the Act). The relevant procedural history of the case is as follows. Claimant filed his claim on February 13, 1990, and benefits were initially awarded by Administrative Law Judge George Fath on June 22, 1993. Employer filed a request for modification and the case was reassigned to Administrative Law Judge Robert L. Hillyard, who ultimately found, in a Decision and Order on Remand dated April 21, 2000, that there was a mistake in a determination of fact with regard to Judge Fath's finding that claimant established the existence of pneumoconiosis. Accordingly, Judge Hillyard denied benefits and his findings were affirmed by the Board. *See Morgan v. Whitaker Coal Co.*, BRB No. 00-0768 BLA (May 10, 2001) (unpub.).

Claimant subsequently filed a request for modification on September 19, 2001. After a long procedural delay, a hearing was held on May 11, 2010, before Judge Sellers (the administrative law judge). In his Decision and Order on Modification Denial of Benefits, dated November 30, 2010, which is the subject of this appeal, the administrative law judge accepted the parties' stipulation that claimant has seventeen years of coal mine employment and is totally disabled. Adjudicating this claim pursuant to the regulations contained in 20 C.F.R. Part 718,[1] the administrative law judge determined that the newly submitted evidence failed to establish the existence of pneumoconiosis. The administrative law judge also determined that there was no mistake in a determination of fact with regard to Judge Hillyard's denial of benefits. Accordingly, the administrative law judge determined that claimant failed to establish a basis for modification pursuant to 20 C.F.R. §725.310 (2000), and he denied benefits.

On appeal, claimant asserts that the administrative law judge erred in finding the newly submitted evidence to be insufficient to establish the existence of pneumoconiosis. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response, unless specifically requested to do so by the Board.

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.[2] 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).

[1] The 2001 revisions to 20 C.F.R. §725.310 do not apply to claims, such as this one, that were pending on January 19, 2001, the effective date of the revised regulations. 20 C.F.R. §725.2(c). Where a former version of the regulations remains applicable, we will cite to the 2000 edition of the Code of Federal Regulations.

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

In order to establish entitlement to benefits pursuant to 20 C.F.R. Part 718,[3] claimant must establish the existence of pneumoconiosis, that his pneumoconiosis arose out of coal mine employment, and that he is totally disabled due to pneumoconiosis.[4] 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*). Failure to establish any one of these elements precludes entitlement. *Id*.

Additionally, because this case involves a request for modification, claimant must establish a change in conditions or a mistake in a determination of fact with regard to the prior denial of his claim, pursuant to 20 C.F.R. §725.310 (2000). In considering whether claimant established a change in conditions, the 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 of the elements which defeated entitlement in the prior decision. *See Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994); *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). The purpose of allowing modification, based on a mistake in a determination of fact, is to vest the fact-finder "with broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *Jessee v. Director, OWCP*, 5 F.3d 723, 725, 18 BLR 2-26, 2-28 (4th Cir. 1993); *see also O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971); *King v. Jericol Mining, Inc.*, 246 F.3d 822, 22 BLR 2-305 (6th Cir. 2001).

Because claimant was previously denied benefits for failure to establish the existence of pneumoconiosis, the administrative law judge first weighed the newly submitted evidence to determine whether claimant established this element of

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[3] Congress recently enacted amendments to the Act, which became effective on March 23, 2010, and apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)). We affirm the administrative law judge's determination that the recent amendments to the Act are not applicable to this case, as claimant filed his claim before January 1, 2005. Decision and Order on Modification at 16.

[4] We affirm, as unchallenged by the parties on appeal, the administrative law judge's finding that claimant established seventeen years of coal mine employment and total disability pursuant to 20 C.F.R. §718.204(b). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

entitlement. Decision and Order on Modification at 14. Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge determined that the "overwhelming majority of [x-rays] submitted on modification were interpreted as negative for pneumoconiosis" by physicians who were dually-qualified as Board-certified radiologists and B readers. *Id*. at 15. Pursuant to 20 C.F.R. §718.202(a)(2), the administrative law judge determined that there was no newly submitted biopsy evidence and that there was "no mistake in fact" with regard to Judge Hillyard's determination that the biopsy evidence was insufficient to establish the existence of pneumoconiosis.[5] *Id*. at 15-16. The administrative law judge also noted that none of the statutory presumptions was available to claimant for establishing the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(3). *Id*. at 16.

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered five newly submitted medical opinions. Decision and Order on Modification at 8-13. The administrative law judge noted that Dr. Baker examined claimant on February 16, 2002, and diagnosed clinical pneumoconiosis,[6] based on Dr. Baker's positive reading of claimant's chest x-ray and claimant's history of coal dust exposure. *Id*. at 16. Because the administrative law judge determined that the x-ray evidence was negative for pneumoconiosis, he gave less weight to Dr. Baker's opinion. *Id*. In contrast, the administrative law judge credited the opinions of Drs. Castle, Rosenberg, Broudy and Dahhan, that claimant does not have clinical pneumoconiosis, as being consistent with his findings that the x-ray evidence was negative for the disease. *Id*.

[5] The administrative law judge noted that "none of the doctors who reviewed the biopsy evidence expressly stated that they found evidence of coal workers' pneumoconiosis." Decision and Order on Modification at 15. The administrative law judge rejected, as equivocal, Dr. Hiller's testimony, based on his review of a biopsy report, that there was "a good likelihood" that claimant suffers from a respiratory condition contributed to, or caused by, his coal mine employment. *Id*. at 15-16; Director's Exhibit 31.

[6] "Clinical pneumoconiosis" consists of those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment. 20 C.F.R. §718.201(a)(1).

With regard to the issue of the existence of legal pneumoconiosis,[7] the administrative law judge found that Dr. Baker opined that claimant suffers from a respiratory disease due, in part, to coal dust exposure, while Drs. Castle, Rosenberg, Broudy and Dahhan, opined that claimant has no respiratory disease caused by his coal mine employment. Decision and Order on Modification at 17. Although the administrative law judge considered the opinions of Drs. Baker, Castle and Dahhan to be reasoned and documented, he assigned controlling weight to Dr. Castle's opinion, that claimant's respiratory condition is attributable entirely to his smoking history, because Dr. Castle "reviewed extensive evidence" and better explained the basis for his medical conclusions. *Id*. at 19. Thus, the administrative law judge found that the newly submitted evidence was insufficient to establish the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). *Id*. at 20. The administrative law judge further found, based on his review of all of the evidence previously considered by Judge Hillyard,[8] that there was no mistake in a determination of fact with regard to Judge Hillyard's prior finding that claimant does not have either clinical or legal pneumoconiosis. *Id*. at 21.

Claimant asserts that he established the existence of pneumoconiosis, based on the deposition testimony of Dr. Hiller and the opinion of Dr. Baker.[9] As noted by the administrative law judge, Dr. Hiller reviewed a biopsy report and stated that there is a "good likelihood" that claimant's coal mine employment contributed to, or caused, emphysema and chronic bronchitis. Director's Exhibit 31 at 7. Contrary to claimant's assertion, the administrative law judge permissibly found that Dr. Hiller's testimony was equivocal as to the etiology of the biopsy findings and that it did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). *See Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988); *Morgan v. Whitaker Coal Co.*, BRB No. 98-0908 BLA (July 15, 1999) (unpub.).

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[7] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

[8] The administrative law judge incorporated the summary of evidence provided by Administrative Law Judge Robert L. Hillyard and determined that it was "thorough and accurate." Decision and Order on Modification at 6; Director's Exhibit 106.

[9] We affirm the administrative law judge's findings that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §20 C.F.R. 718.202(a)(1), (3), as his findings under those subsections are not challenged. *See Skrack*, 6 BLR at 1-711.

Although claimant generally challenges the weight accorded Dr. Baker's opinion at 20 C.F.R. §718.202(a)(4), he does not explain with any specificity how the administrative law judge erred in weighing the conflicting medical opinions.[10] The Board's circumscribed scope of review requires that a party challenging the Decision and Order below demonstrate why substantial evidence does not support the result reached or why the Decision and Order is contrary to law. *See* 20 C.F.R. §802.211(b); *Cox v. Director, OWCP*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986), *aff'g* 7 BLR 1-610 (1984); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Slinker v. Peabody Coal Co.*, 6 BLR 1-465 (1983); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). Because claimant has failed to adequately raise or brief this issue, we affirm the administrative law judge's finding that the newly submitted medical opinion evidence is insufficient to establish the existence of either clinical or legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), and that claimant failed to demonstrate a change in conditions pursuant to 20 C.F.R. §725.310 (2000). *See Cox* 791 F.2d 445, 9 BLR 2-46; *Sarf*, 10 BLR 1-119; *Fish* , 6 BLR 1-107.

We further affirm, as within the administrative law judge's discretion, his determination that there was no mistake in a determination of fact with regard to Judge Hillyard's denial of benefits. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714, 22 BLR 2-537, 2-553 (6th Cir. 2002); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); Decision and Order on Modification at 22. Thus, we affirm the administrative law judge's finding that claimant failed to establish a basis for modification pursuant to 20 C.F.R. §725.310 (2000). Decision and Order on Modification at 22.

[10] Claimant also does not explain his allegation that "the other physicians are clearly hostile to the Act." Claimant's Brief at 4.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge