BRB No. 00-0918 BLA

WLLIAM H. BROCK, JR.)
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Claimant-Petitioner)
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v.)
) DATE ISSUED:
NEW HORIZONS COAL, INCORPORATED)
)
and)
)
GREAT WESTERN RESOURCES)
)
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 and the Order on Reconsideration of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Sidney B. Douglass, Harlan, Kentucky, for claimant.

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

Edward Waldman (Howard M. Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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 and McGRANERY, Administrative Appeals Judges, and

NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order on Modification-Denial of Benefits and the Order on Reconsideration (1999-BLA-0714) of Administrative Law Judge Robert L. Hillyard rendered 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] Claimant filed his application for benefits on May 2, 1994. Director's Exhibit 1. The District Director of the Office of Workers' Compensation Programs initially denied benefits, and claimant requested a hearing, which was held on May 3, 1996 by Administrative Law Judge Richard E. Huddleston.

In a Decision and Order-Awarding Benefits issued on September 26, 1996, Judge Huddleston credited claimant with "at least 20 years" of coal mine employment, Director's Exhibit 34 at 3, and found that the weight of the chest x-ray readings viewed in light of the readers' radiological credentials did not establish the existence of clinical pneumoconiosis. Director's Exhibit 34 at 5. Judge Huddleston found, however, that Dr. Glen R. Baker's medical examination report established the existence of legal pneumoconiosis arising out of coal mine employment, because Dr. Baker detected a moderate obstructive pulmonary impairment by pulmonary function study, which impairment Dr. Baker related "at least partially to coal dust exposure." Director's Exhibit 34 at 6. Judge Huddleston noted that in making this diagnosis, Dr. Baker characterized claimant's effort on the June 21, 1994, qualifying[2] pulmonary function study as "suboptimal" and cautioned that the study results "may not represent [claimant's] true pulmonary function." Director's Exhibit 14. Nevertheless, because a reviewing physician checked a box on a validation form indicating that the June 21, 1994 study was acceptable, and because Dr. Baker diagnosed a moderate obstructive impairment even "while taking into consideration the [c]laimant's less than maximal effort on pulmonary function testing," Director's Exhibit 34 at 6, the administrative law judge credited Dr. Baker's diagnosis of pneumoconiosis and his conclusion that claimant was totally disabled by the moderate obstructive pulmonary impairment. Additionally, because Dr. Baker attributed claimant's obstructive impairment to both smoking and coal dust exposure, Judge Huddleston found that claimant's total disability was due at least in part to pneumoconiosis. Accordingly,

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[1] 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 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] A "qualifying" objective study yields values which are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendices B, C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

Judge Huddleston awarded benefits.

Employer appealed Judge Huddleston's Decision and Order-Awarding Benefits to the Board. Before employer's petition for review was due, employer timely filed a petition for modification with the District Director pursuant to 20 C.F.R. §725.310, alleging that the award of benefits was a mistake. Director's Exhibit 43. At the same time, employer moved that its appeal be dismissed, subject to reinstatement. Director's Exhibit 42. The Board granted employer's motion to dismiss and remanded the case to the District Director for consideration of employer's request for modification.

In support of employer's position that a mistake in a determination of fact had been made, it submitted several negative x-ray readings, two medical examination reports by Dr. Bruce C. Broudy, a medical record review report by Dr. Broudy and a medical record review report by Dr. Gregory J. Fino, and the deposition of Dr. Jerome D. Miller, claimant's treating physician. Director's Exhibits 52, 56; Employer's Exhibits 2, 3.

Dr. Broudy, who is Board-certified in Internal Medicine and Pulmonary Disease, concluded that claimant does not have pneumoconiosis but has chronic bronchitis due to smoking. Based upon the recent pulmonary function and blood gas studies Dr. Broudy administered and which were non-qualifying, Dr. Broudy reported that claimant's chronic bronchitis has caused "at most" a very mild form of chronic airways obstruction, Employer's Exhibit 3 at 2, which leaves claimant with sufficient respiratory capacity to perform his usual coal mine employment. Dr. Broudy reported that the tracings of Dr. Baker's earlier, qualifying pulmonary function study reflected inconsistent effort by claimant in performing the test.

Dr. Fino, who is also Board-certified in Internal Medicine and Pulmonary Disease, concluded that claimant does not have pneumoconiosis, and stated that the valid, non-qualifying objective studies administered by Dr. Broudy indicated that "[f]rom a functional standpoint, this man's pulmonary system is normal." Employer's Exhibit 3 at 7. Dr. Fino reported that Dr. Baker's previous pulmonary function study was invalid because of a "lack of reproducibility in the expiratory tracings," and thus did not represent claimant's "maximum lung function." Employer's Exhibit 3 at 2. Dr. Fino concluded that because "[t]here is no respiratory impairment present," claimant retains the respiratory capacity to perform his usual coal mine employment, even assuming that his job required heavy labor. Employer's Exhibit 3 at 7.

Dr. Miller, who is Board-certified in Internal Medicine, testified that claimant has pneumoconiosis, "based primarily" on Dr. Miller's "2/1" reading of a chest x-ray. Director's Exhibit 56 at 21. Additionally, based on Dr. Baker's 1994 testing, Dr. Miller believed that claimant is totally disabled due to pneumoconiosis. Dr. Miller testified that, notwithstanding Dr. Broudy's subsequent, non-qualifying objective

tests obtained in two separate examinations, claimant is totally disabled by pneumoconiosis "[b]ecause he still has a chest x-ray that I interpreted as showing a 2/1 classification of pneumoconiosis," and because he has "a history of dyspnea." Director's Exhibit 56 at 38.

Claimant relied on Dr. Miller's testimony, and additionally submitted treatment notes from Dr. Miller recording nine office visits between June 2, 1997 and April 27, 1999. Claimant's Exhibit 3. These notes reflect treatment for lower back pain and shortness of breath. Dr. Miller noted "CWP" and "COPD" in several entries. *Id*.

The District Director denied modification, and employer requested a formal hearing, which was held on August 25, 1999 by Administrative Law Judge Robert L. Hillyard.[3]

The administrative law judge credited claimant with twenty-three years and six months of coal mine employment and, based upon "a review of the record and circumstances," found that "the previous determination that the [c]laimant has pneumoconiosis was a mistake in a determination of fact." Decision and Order at 11. The administrative law judge explained that, "Dr. Baker relied heavily on the [June 21, 1994] pulmonary function study in reaching his diagnosis," whereas the "great disparity" between Dr. Broudy's subsequent, non-qualifying pulmonary function studies and Dr. Baker's earlier study "call[ed] into question the credibility of Dr. Baker's carefully worded and guarded diagnosis." Decision and Order at 10. The administrative law judge additionally found that the weight of the x-ray readings viewed in light of the readers' radiological credentials did not establish the existence of pneumoconiosis, and that the opinions of Drs. Broudy and Fino that claimant does not have pneumoconiosis were better reasoned and explained than the opinion of either Dr. Baker or Dr. Miller. In addition, the administrative law judge found that the weight of the medical evidence on modification did not establish that claimant is totally disabled. Applying the Board's case law recognizing that "[o]ne could hardly find a better reason for rendering justice than that it would be unjust or unfair to require an employer to pay benefits to a miner who does not meet the requirements of the Act," Decision and Order at 11, quoting *Branham v. BethEnergy Mines, Inc.*, 21 BLR 1-79, 1-83 (1998)(McGranery, J., dissenting), the administrative law judge granted employer's request for modification and denied benefits. Thereafter, the administrative law judge denied claimant's motion for reconsideration.

On appeal, claimant contends that the administrative law judge erred in his weighing of the medical evidence and in concluding that a mistake of fact was demonstrated. Employer responds, urging affirmance of the denial of benefits, and the Director, Office of Workers' Compensation Programs (the Director), has declined

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[3] The record contains no objection by any party to the assignment of the case to a different administrative law judge on modification.

to participate in this appeal.[4]

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States Court of Appeals for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on March 9, 2001, to which all parties have responded. The parties agree that none of the regulations at issue in the lawsuit affects the outcome of this case. Based upon the briefs submitted by the parties, and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, we will proceed with the adjudication of this appeal.

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 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).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 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, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Section 22 of the Longshore Act, 33 U.S.C. §922 (the statute underlying 20 C.F.R. §725.310), provides in part:

> Upon his own initiative, or upon the application of any party in interest . . . on the ground of a change in conditions or because of a mistake in a determination of fact by the [administrative law judge], the [administrative law judge] may, at any time prior to one year after the date of the last payment of compensation . . . or at any time prior to one year after the rejection of a claim, review a compensation case . . . in accordance with the procedure prescribed in respect of claims in

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[4] The administrative law judge's finding that the weight of the x-ray readings by radiological experts did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) is affirmed as unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

> section 919 of this title, and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation . . . .

"[B]y its plain language, 33 U.S.C. §922 is a broad reopening provision that is available to employers and employees alike." *King v. Jericol Mining, Inc.*, 246 F.3d 822, 825, BLR (6th Cir. 2001). "The purpose of this section is to permit a[n] [administrative law judge] to modify an award where there has been 'a mistake in a determination of fact [which] makes such a modification desirable in order to render justice under the act.'" *Blevins v. Director, OWCP*, 683 F.2d 139, 142, 4 BLR 2-104, 2-108 (6th Cir. 1982), quoting *Banks v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459, 464 (1968); *see also Branham v. BethEnergy Mines, Inc.*, 21 BLR 1-79, 1-82-84 (1998)(McGranery, J., dissenting). The administrative law judge has the authority on modification "to reconsider all the evidence for any mistake of fact," including whether "the ultimate fact (disability due to pneumoconiosis) was wrongly decided . . . ." *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230, 18 BLR 2-290, 2-296 (6th Cir. 1994).

Claimant contends that the administrative law judge erred in finding that a mistake of fact was established, when employer did not point to a specific factual error by Judge Huddleston or show that Dr. Baker has recanted his opinion. Claimant's contention lacks merit, as the party seeking modification need not identify a specific factual error or show that a physician has recanted his or her opinion for the administrative law judge to find a mistake of fact. "[N]o matter the grounds stated" for a party's modification request, the administrative law judge's authority on modification extends to whether the "ultimate fact" was correctly decided. *Id.*

Claimant's argument that employer requested modification solely to avoid having its appeal dismissed by the Board for failure to timely file a petition for review is likewise unavailing. Modification is freely available at any time within the one-year modification period, 33 U.S.C. §922; 20 C.F.R. §725.310; *see King, supra*; *Worrell, supra*, and here, employer filed its modification request within one year of the award of benefits and also on or about the date its petition for review was due at the Board.[5] Consequently, claimant's assertion that employer clearly abused the Board's process and thus should not have been permitted to seek modification lacks merit.

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[5] Although claimant is correct that the Board denied employer's request for a 30-day extension in which to file its petition for review, the Board nevertheless afforded employer an additional ten days from receipt of the Board's order in which to file its petition for review. Order, Dec. 20, 1996. Allowing time for service of the Board's order, employer's January 7, 1997 request for modification was made on or before the date upon which its petition for review was due. Therefore, we do not detect any impropriety in employer's request for modification.

Claimant next contends that Dr. Fino's medical record review report merited no weight because Dr. Fino "has been examining federal black lung claimant's [sic] in Kentucky . . ., [thereby] practicing medicine in the state of Kentucky without a Kentucky medical license." Claimant's Brief at 14. The administrative law judge did not err when he rejected this argument in his Order on Reconsideration. The administrative law judge reasonably considered that, "[b]ecause Dr. Fino did not examine the [c]laimant in the Commonwealth of Kentucky," but rather conducted a record review, the state in which Dr. Fino was licensed to practice medicine was not relevant to the credibility of his opinion. Order on Reconsideration at 1; *see Mays v. Piney Mountain Coal Co.*, 21 BLR 1-59, 1-64 (1997)(Dolder, J., concurring and dissenting)(credibility determinations are for the administrative law judge).

Claimant contends that the administrative law judge failed to accord proper weight to the opinion of claimant's treating physician, Dr. Miller. An administrative law judge may, but is not required to, accord greater weight to the opinion of a treating physician. *See Griffith v. Director, OWCP*, 49 F.3d 184, 186-87, 19 BLR 2-111, 2-117 (6th Cir.1995); *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1042, 17 BLR 2-16, 2-24 (6th Cir. 1993); *Berta v. Peabody Coal Co.*, 16 BLR 1-69, 1-70 (1992).

Here, the administrative law judge considered Dr. Miller's deposition testimony that claimant has pneumoconiosis, but found Dr. Miller's opinion "entitled to less weight" than the contrary opinions of Drs. Broudy and Fino, which the administrative law judge permissibly found to be better documented and reasoned. Decision and Order at 13; *see Fife v. Director, OWCP*, 888 F.2d 365, 369, 13 BLR 2-109, 2-114 (6th Cir.1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir.1983); *Mays, supra*; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 and n.4 (1993). The administrative law judge found, within his discretion, that Dr. Miller's diagnosis was based mainly upon his own 2/1 x-ray interpretation, when "[n]o other physician read an x-ray as 2/1," and upon claimant's "subjective symptoms of shortness of breath," which the administrative law judge considered "an inadequate basis" to support a finding of pneumoconiosis. Decision and Order at 13; *see Fife, supra; Rowe, supra; Trumbo, supra*. Under these circumstances, the administrative law judge was not required to accord greatest weight to Dr. Miller's opinion. *See Griffith, supra*; *Berta, supra*. Moreover, substantial evidence supports the administrative law judge's findings, and the Board is not empowered to reweigh the evidence. *See Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Mays, supra*. Therefore, we affirm the administrative law judge's finding that the medical opinion evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Consequently, we affirm the administrative law judge's finding that a mistake of fact was demonstrated because the record on modification did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), a necessary

element of entitlement under Part 718. *See Worrell, supra*; *Branham, supra*; *Trent, supra*; *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986)(*en banc*).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge