BRB No. 11-0669 BLA

GEORGE McCOWN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
LEE WEST COAL COMPANY	)	DATE ISSUED: 07/31/2012
	)	
and	)	
	)	
TRAVELERS INSURANCE COMPANY	)	
	)	
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 Granting the Claimant's Request for Modification of John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Ryan C. Gilligan (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Granting the Claimant's Request for Modification (2009-BLA-5831) of Administrative Law Judge John P. Sellers, III, with respect to a claim filed pursuant to the provisions of 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).[1] Claimant filed a subsequent claim on May 27, 2003.[2] Director's Exhibit 3. Administrative Law Judge Daniel F. Solomon issued a Decision and Order – Denying Benefits in which he credited claimant with twenty-seven years of coal mine employment, based on the stipulation of the parties, and determined that claimant established total disability and, therefore, a change in an applicable condition of entitlement under 20 C.F.R. §725.309(d). Judge Solomon further found, however, that claimant did not prove that he had pneumoconiosis and denied benefits. Pursuant to claimant's appeal, the Board affirmed the denial of benefits. *G.M.* [*McCown*] *v. Lee West Coal Co.*, BRB No. 06-0947 BLA (Sept. 25, 2007)(unpub.).

On May 28, 2008, claimant filed a timely request for modification, which the district director granted in a Proposed Decision and Order awarding benefits. At employer's request, the case was transferred to the Office of Administrative Law Judges for hearing and was assigned to Judge Sellers (the administrative law judge). In his Decision and Order, the administrative law judge found that a preponderance of the newly submitted evidence, considered in conjunction with the previously submitted evidence, was insufficient to establish the existence of clinical pneumoconiosis, but was sufficient to establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c).[3] Thus, the administrative law judge found that claimant established a mistake in a determination of fact and a basis for modification under 20 C.F.R. §725.310. The administrative law judge awarded benefits, commencing May 2003.

---

[1] The recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply in this case, as the claim was filed before January 1, 2005. Director's Exhibit 2.

[2] Claimant filed his first claim on October 26, 1994. Director's Exhibit 1. The district director issued a preliminary denial dated March 21, 1995, in which he indicated that the evidence was insufficient to establish any of the elements of entitlement. *Id*. On June 6, 1995, the district director ordered claimant to show cause within thirty days why his claim should not be dismissed by reason of abandonment for failure to appear at an informal conference on June 2, 1995. *Id*. Claimant took no further action until he filed the current subsequent claim. Director's Exhibit 3.

[3] The administrative law judge further found that, in establishing the existence of legal pneumoconiosis, i.e., a chronic respiratory impairment related to coal mine employment, claimant satisfied the element of causality, i.e., that the pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b). *See Kiser v. L & J Equipment Co.*, 23 BLR 1-246, 1-259 n.18 (2006); Decision and Order at 25.

On appeal, employer challenges the administrative law judge's evaluation of the evidence regarding the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), and total disability causation pursuant to 20 C.F.R. §718.204(c). Additionally, employer challenges the administrative law judge's reliance on the preamble to the amended regulations, and asserts that he did not properly weigh the medical opinions of record. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.[4]

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.[5] 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).

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that his pneumoconiosis arose out of coal mine employment, that he is totally disabled by a respiratory or pulmonary impairment, and that he is totally disabled by pneumoconiosis. 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 (1989).

I. Whether Modification Would Render Justice Under the Act

Employer argues initially that the administrative law judge erred in finding that reopening this case on modification renders justice under the Act. Employer maintains that claimant merely seeks "a second opportunity to prevail with a more favorably disposed [administrative law judge]." Employer's Brief at 11. Whether granting modification would render justice under the Act is an issue that is committed to the discretion of the administrative law judge. *See Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230, 18 BLR 2-291, 2-296 (6th Cir. 1994). In this case, the administrative law

[4] We affirm, as unchallenged by the parties on appeal, the administrative law judge's finding that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2). *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order at 20, 25.

[5] The record reflects that claimant's coal mine employment was in Kentucky. Director's Exhibits 1-82, 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

judge noted employer's contentions that the purpose of modification is not served by allowing the claimant to retry the case, get a more favorably disposed administrative law judge, or engage in a "do-over." Decision and Order at 26. The administrative law judge rejected employer's contention, stating:

> The United States Supreme Court and the United States Court of Appeals for the Sixth Circuit beg to differ, however. In determining whether a mistake in fact has occurred, the Supreme Court of the United States has stated that an administrative law judge has broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the new evidence initially submitted. The Sixth Circuit has similarly explained, "[if] a claimant merely alleges that the ultimate fact . . . was wrongly decided, the [district director or administrative law judge] may . . . accept this contention and modify the final order accordingly." Neither the Supreme Court nor the Sixth Circuit suggests that modification is precluded as a do-over or an attempt to get a more favorably disposed administrative law judge.

Id., *citing O'Keefe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971); *quoting Worrell*, 27 F.3d at 230, 18 BLR at 2-296. Because the administrative law judge provided a reasoned explanation of his finding, we hold that employer has not established that the administrative law judge abused his discretion in determining that reopening the claim on modification would render justice under the Act. *See Worrell*, 27 F.3d at 230, 18 BLR at 2-296.

II. Mistake in a Determination of Fact

Claimant may establish a basis for modification of the denial of his claim by establishing either a change in conditions or a mistake in a determination of fact. 20 C.F.R. §725.310. In considering whether a change in conditions has been established, 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 that 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 (1993). As to the issue of a mistake in a determination of fact, a claimant need not allege a specific error in order for an administrative law judge to find a basis for modification, as the administrative law judge has broad discretion to correct mistakes of fact, including the ultimate fact of entitlement to benefits. *See Worrell*, 27 F.3d at 230, 18 BLR at 2-296.

The administrative law judge initially determined that claimant did not establish a change in conditions or mistake in a determination of fact with respect to the finding that he does not have clinical pneumoconiosis. Decision and Order at 20. In considering the

issue of legal pneumoconiosis, the administrative law judge weighed the opinions of Drs. Rasmussen, Baker, Rosenberg and Repsher. With respect to Dr. Rasmussen's opinion, the administrative law judge stated, "I accord his opinion substantial weight; however, I also note that he does not provide extensive explanation for his opinion, other than to note that it is an accepted fact that both coal dust exposure and smoking can cause chronic obstructive pulmonary disease and emphysema." *Id*. The administrative law judge further indicated that Dr. Rasmussen "clearly has excellent credentials in the area of pulmonary medicine and specifically the area of coal workers' pneumoconiosis" and that his opinion "is reasoned in the sense that he makes clear that coal dust exposure and cigarette smoke are known causes of chronic obstructive pulmonary disease and therefore he considers both [claimant's] history of coal mining and smoking to have substantially contributed to his pulmonary condition." *Id*. at 20 n.5. The administrative law judge also credited Dr. Baker's opinion, stating: "Given his qualifications as a [B]oard[-]certified pulmonologist, I accord substantial weight to Dr. Baker's opinion that coal dust exposure contributed to [claimant's] impairment." *Id*. at 20.

Regarding Dr. Rosenberg's opinion ruling out any link between coal dust and claimant's lung disease, the administrative law judge found that it was entitled to less weight, "to the extent that it fails to acknowledge that coal dust can cause emphysema[,] even in the absence of clinical coal workers' pneumoconiosis, or that it can progress independently of the degree of clinical coal workers' pneumoconiosis." *Id*. at 23. The administrative law judge also gave little weight to Dr. Repsher's opinion, stating:

> It is quite clear that Dr. Repsher was basing his opinion on his view that coal dust as a general rule is not responsible for anything more than a temporal, insignificant decrease in FEV1, which is reasoning that is contrary to the position taken by [the Department of Labor (DOL)] and the [National Institute for Occupational Safety and Health]. I therefore give little weight to his opinion, despite his excellent credentials in pulmonary medicine.

Id. at 24. The administrative law judge concluded:

> In sum, I accord substantial weight to the opinions of Drs. Rasmussen and Baker that [claimant's] 27 years of dust exposure in the mines, most of which was underground, was a significant contributor to his totally disabling obstructive disease/emphysema. Although Dr. Rosenberg and Dr. Repsher offered more elaborate opinions, their opinions are not persuasive for the reasons discussed. I find, therefore, that [claimant] has demonstrated a form of legal pneumoconiosis.

Id. Accordingly, the administrative law judge also determined that claimant established a mistake in a determination of fact in the denial of his 2003 claim. *Id*.

Employer contends that the administrative law judge erred in crediting the medical opinions of Drs. Rasmussen and Baker at 20 C.F.R. §718.202(a)(4) and in discrediting the opinions of Drs. Rosenberg and Repsher. We reject employer's arguments. The administrative law judge rationally found that the "critical issue in this case is the cause of claimant's totally disabling respiratory or pulmonary condition, which does not concern so much a change in condition but a question of fact." Decision and Order at 16; 20 C.F.R. §725.310; *see King v. Jericol Mining, Inc*., 246 F.3d 822, 22 BLR 2-305 (6th Cir. 2001). The administrative law judge further noted correctly that he "has broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." Decision and Order at 26, *quoting O'Keeffe*, 404 U.S. at 256. Contrary to employer's contention, therefore, it was within the administrative law judge's discretion to further reflect on the evidence initially submitted, including Dr. Rasmussen's opinion, in determining whether the denial of claimant's 2003 claim contained a mistake in a determination of fact. *See O'Keefe*, 404 U.S. at 256; *Worrell*, 27 F.3d at 230, 18 BLR at 2-296.

In addition, the administrative law judge rationally determined that Dr. Rasmussen's opinion was adequately documented and reasoned. The question "of whether a physician's report is sufficiently documented and reasoned is a credibility matter left to the trier of fact." *Moseley v. Peabody Coal Co.*, 769 F.2d 357, 8 BLR 2-22 (6th Cir. 1985); *see also See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 22 BLR 2-494 (6th Cir. 2002). Within a proper exercise of his discretion, the administrative law judge credited Dr. Rasmussen's opinion because it was based on physical examinations of claimant, claimant's coal mine employment history, his smoking history, pulmonary function studies, blood gas studies, treadmill stress tests and EKGs. *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); Decision and Order at 10-11, 20; Director's Exhibit 42. Contrary to employer's contention, Dr. Rasmussen acknowledged claimant's history of arteriosclerotic heart disease, and his abnormal exercise EKGs, and explained that claimant's heart disease "played no role in his impaired lung function since there was no evidence of cardiomegaly or congestive heart failure." Director's Exhibit 42. Moreover, the administrative law judge permissibly credited Dr. Rasmussen's diagnosis of legal pneumoconiosis, as Dr. Rasmussen was not required to apportion the relative contributions of smoking and coal dust exposure to claimant's chronic obstructive pulmonary impairment. *See Crockett Collieries, Inc. v. Director, OWCP* [*Barrett*], 487 F.3d 350, 23 BLR 2-472 (6th Cir. 2007); *Cornett*, 227 F.3d at 578, 22 BLR at 2-124. We affirm, therefore, the administrative law judge's finding that Dr. Rasmussen's diagnosis of legal pneumoconiosis is reasoned and entitled to substantial weight.

We also reject employer's assertion that the administrative law judge erred in crediting Dr. Baker's diagnosis of legal pneumoconiosis. The administrative law judge

permissibly accorded substantial weight to Dr. Baker's opinion on the issue of legal pneumoconiosis because Dr. Baker based his opinion on the physical examination of claimant, his coal mine employment and smoking histories, and the results of his pulmonary function and blood gas studies. *See Cornett*, 227 F.3d at 578, 22 BLR at 2-124. Moreover, the administrative law judge rationally determined that Dr. Baker unequivocally opined that cigarette smoking and coal dust both contributed to claimant's totally disabling pulmonary impairment.[6] *See Napier*, 301 F.3d at 713-714, 22 BLR at 2-553; *Stephens*, 298 F.3d at 522, 22 BLR at 2-513. As noted above with respect to the administrative law judge's crediting of Dr. Rasmussen's opinion, the administrative law judge was not required to discredit Dr. Baker's opinion because he did not apportion the relative contributions of smoking and coal dust exposure to claimant's chronic obstructive pulmonary impairment. *Cornett*, 227 F.3d at 576, 22 BLR at 2-121. Thus, we affirm the administrative law judge's finding that Dr. Baker's opinion is entitled to substantial weight.

Finally, we hold that the administrative law judge acted within his discretion in discrediting the opinions of Drs. Rosenberg and Repsher, as their conclusions were based upon premises inconsistent with the scientific views accepted by the DOL in the preamble to the amended regulations. *See Crockett*, 487 F.3d at 355, 23 BLR at 2-481; *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117 (2009), *aff'd sub nom. Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011). In addition, the administrative law judge permissibly found that Dr. Rosenberg did not adequately explain why claimant's partial post-bronchodilator improvement indicated that his chronic obstructive pulmonary disease was related solely to cigarette smoking. *See Barrett*, 478 F.3d at 356, 23 BLR at 2-483; *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). Consequently, we affirm the administrative law judge's decision to give less weight to the opinions of Drs. Rosenberg and Repsher.

In conclusion, we affirm the administrative law judge's finding that the opinions of Drs. Rasmussen and Baker were sufficient to establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *See Napier*, 301 F.3d at 713-714, 22 BLR at 2-553; *Stephens*, 298 F.3d at 522, 22 BLR at 2-513. Because we have affirmed the administrative law judge's credibility determinations on the issue of legal pneumoconiosis, and the administrative law judge relied upon those determinations to conclude that claimant established that his total disability is due to pneumoconiosis, we also affirm, therefore, his finding at 20 C.F.R. §718.204(c), and the award of benefits. *See Grundy Mining Co. v. Flynn*, 353 F.3d 467, 483, 23 BLR 2-44, 2-66 (6th Cir. 2003); *Peabody Coal Co. v. Smith*, 127 F.3d 504, 507, 21 BLR 2-180, 2-185 (6th Cir. 1997).

[6] Dr. Baker stated that claimant's obstructive impairment was "caused by both his cigarette smoking and coal dust exposure and possibly with a synergistic or additive effect." Director's Exhibit 90.

Accordingly, the administrative law judge's Decision and Order Granting the Claimant's Request for Modification is affirmed.

SO ORDERED.

_____
ROY P. SMITH
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge