BRB No. 12-0504 BLA

MARY ELLIOTT (Executrix of the Estate of EARL ELLIOTT, Deceased Miner)	)	
Claimant-Petitioner	)	
v.	)	
BUFFALO MINING COMPANY	)	DATE ISSUED: 07/19/2013
Employer-Respondent	)	
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.

Leonard Stayton, Inez, Kentucky, for claimant.

Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Claimant[1] appeals the Decision and Order on Modification – Denying Benefits (2011-BLA-5649) of Administrative Law Judge Richard A. Morgan rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C.

[1] Claimant is the executrix of the estate of the miner, who died on July 26, 2007. Director's Exhibit 179.

§§901-944 (Supp. 2011)(the Act).[2] This claim is before the Board for the fourth time.[3] In his 2004 Decision and Order, the administrative law judge credited the miner with at least twelve years of coal mine employment, as stipulated by the parties, and adjudicated this subsequent claim, filed on August 15, 2001, pursuant to 20 C.F.R. Parts 718 and 725. The administrative law judge found that the medical evidence developed since the prior denial of benefits established the existence of pneumoconiosis and that the miner was totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §§718.202(a), 718.204(b). The administrative law judge therefore found that the miner established a change in an applicable condition of entitlement, as required by 20 C.F.R. §725.309(d). Evaluating the merits of entitlement, the administrative law judge found that the miner was totally disabled due to pneumoconiosis arising out of coal mine employment. Accordingly, the administrative law judge awarded benefits. Director's Exhibit 129.

Upon employer's appeal, and the miner's cross-appeal, the Board affirmed the administrative law judge's findings that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b), and thus demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). The Board, however, held that the administrative law judge erred in weighing the x-ray and medical opinion evidence at 20 C.F.R. §718.202(a)(1), (4), and in evaluating the CT scans pursuant to 20 C.F.R. §718.107(a). Therefore, the Board vacated the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(1), (4), 718.107, and instructed the administrative law judge, on remand, to reweigh the relevant and admissible x-ray readings, CT scan readings, and medical opinions to determine whether they support a finding of the existence of either clinical or legal pneumoconiosis pursuant to 20 C.F.R. §§718.202(a), 718.201. In light of the Board's holdings at 20 C.F.R. §718.202(a), the Board vacated the administrative law judge's disability causation finding pursuant to 20 C.F.R. §718.204(c) and instructed him to reweigh the medical opinions on that issue after reassessing the relevant evidence regarding the issue of the existence of pneumoconiosis. *Elliott v. Buffalo Mining Co.*, BRB Nos. 05-0235 BLA and 05-0235 BLA-A (Feb. 15, 2006) (unpub.); Director's Exhibit 155.

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

[3] The procedural history of this case is contained in the Board's prior decisions in *M.E.* [*Elliott*] *v. Buffalo Mining Co.*, BRB No. 08-0754 BLA (July 29, 2009)(unpub.); *E.E.* [*Elliott*] *v. Buffalo Mining Co.*, BRB No. 06-0892 BLA (July 16, 2007)(unpub.); and *Elliott v. Buffalo Mining Co.*, BRB Nos. 05-0235 BLA and 05-0235 BLA-A (Feb. 15, 2006)(unpub.).

On remand, the administrative law judge, in his 2006 Decision and Order, found that the evidence was sufficient to establish that the miner had pneumoconiosis and that his total disability was due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a), 718.204(c). Accordingly, the administrative law judge awarded benefits. Director's Exhibit 162.

Employer again appealed, and the Board vacated the administrative law judge's award of benefits on the ground that he erred in excluding employer's rebuttal interpretation of the April 10, 2004 x-ray by Dr. Scatarige, contained at Employer's Exhibit 21. Furthermore, because the administrative law judge's evidentiary error influenced his weighing of the evidence on the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1), (4), and disability causation at 20 C.F.R. §718.204(c), the Board also vacated his findings thereunder. The Board instructed the administrative law judge on remand to admit Employer's Exhibit 21 into the record, and then to consider whether the miner had satisfied his burden of proving the existence of pneumoconiosis and disability causation. *E.E.* [*Elliott*] *v. Buffalo Mining Co.*, BRB No. 06-0892 BLA (July 16, 2007)(unpub.); Director's Exhibit 180.

On remand, the administrative law judge admitted Employer's Exhibit 21 into the record and, upon weighing the conflicting x-rays and medical opinions, determined that claimant failed to establish the existence of pneumoconiosis by a preponderance of the evidence pursuant to 20 C.F.R. §718.202(a). Accordingly, the administrative law judge denied benefits. Director's Exhibit 186.

In its Decision and Order dated July 29, 2009, the Board affirmed the administrative law judge's finding that the x-ray and medical opinion evidence was insufficient to establish either clinical or legal pneumoconiosis at 20 C.F.R. §718.202(a). The Board concluded that the administrative law judge provided valid reasoning for his evaluation of the opinion of Dr. Kowalti, the miner's treating physician who diagnosed pneumoconiosis, and his determination to accord the most weight to the opinion of Dr. Zaldivar, supported by the opinion of Dr. Crisalli, over the contrary opinions of Drs. Kowalti, Baker, and Ranavaya, in finding that the evidence was insufficient to establish clinical or legal pneumoconiosis. Accordingly, the Board affirmed the denial of benefits. *M.E.* [*Elliott*] *v. Buffalo Mining Co.*, BRB No. 08-0754 BLA (July 29, 2009)(unpub.); Director's Exhibit 197.

Claimant filed a timely modification petition on July 26, 2010, pursuant to 20 C.F.R. §725.310, and submitted additional evidence. The administrative law judge determined that claimant had submitted no new radiological evidence and that she had conceded that clinical pneumoconiosis was not established. The administrative law judge found that the evidence submitted in support of modification, considered in conjunction

with the earlier evidence, was insufficient to establish the existence of either clinical or legal pneumoconiosis pursuant to Section 718.202(a). Finding that claimant failed to establish a change in conditions or a mistake in a determination of fact pursuant to Section 725.310, the administrative law judge denied claimant's request for modification, and denied benefits.

In the present appeal, claimant challenges the administrative law judge's finding that legal pneumoconiosis was not established by the medical opinion evidence pursuant to 20 C.F.R. §718.202(a). Thus, claimant asserts that the administrative law judge should have found that disability causation was established at 20 C.F.R. §718.204(c), and should have granted modification pursuant to 20 C.F.R. §725.310. Employer responds in support of the denial of benefits.[4] The Director, Office of Workers' Compensation Programs, has declined to file a response brief.

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).

Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §922, which is incorporated into the Act by 30 U.S.C. §932(a) and implemented by 20 C.F.R. §725.310, authorizes the modification of an award or denial of benefits, based upon a mistake in a determination of fact or a change in conditions. Mistakes of fact may be 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); *Betty B Coal Company v. Director, OWCP* [*Stanley*], 194 F.3d 491, 22 BLR 2-1, 2-11 (4th Cir. 1999).

Claimant contends that the administrative law judge erred in finding that the medical opinion evidence was insufficient to establish the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4). Specifically, claimant argues that the administrative law judge erred in failing to credit the opinions in which pneumoconiosis

[4] We accept employer's brief in opposition to claimant's petition for review as part of the record before the Board. 20 C.F.R. §802.217.

[5] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as the miner was last employed in the coal mining industry in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Director's Exhibit 2.

was diagnosed, particularly the opinion of Dr. Ranavaya, as supported by the opinions of Drs. Baker and Kowalti. Claimant asserts that because Dr. Ranavaya's opinion is based on a physical examination, symptoms, the miner's work and social histories, and is consistent with the preamble to the regulations and applicable case law, it is well reasoned and documented, and constitutes substantial evidence to support a finding of legal pneumoconiosis. Claimant contends that the contrary opinions of Drs. Zaldivar, Crisalli, and Basheda, who determined that the miner did not have pneumoconiosis, are entitled to no weight. Specifically, claimant argues that Dr. Zaldivar's opinion is contrary to law, the preamble and the regulations; that Dr. Crisalli's opinion is contrary to law; and that Dr. Basheda's opinion is hostile to the Act and contrary to law, the preamble, and medical literature. Claimant's Brief at 22-33. Claimant's arguments lack merit.

In finding the evidence of record insufficient to establish the existence of legal pneumoconiosis pursuant to Section 718.204(a)(4), the administrative law judge incorporated by reference the summary of evidence contained in his previous decisions and accurately summarized the newly submitted evidence on modification. Decision and Order at 3-6. In reviewing claimant's newly submitted evidence, the administrative law judge determined that the miner's medical treatment records for the period of October 18, 2006 through October 28, 2006, which had been in existence but had not been submitted before, "establish nothing more than the miner's respiratory disability and diagnosis and treatment for lung cancer and the results of a Cleveland Clinic biopsy which was positive for non-small cell lung carcinoma."[6] Decision and Order at 4; Claimant's Exhibit 2. The administrative law judge also reviewed the newly submitted deposition testimony of Dr. Ranavaya, who diagnosed clinical and legal pneumoconiosis, Claimant's Exhibit 1, and the consultative medical report and deposition of Dr. Basheda, who determined that the miner's respiratory impairment was not related to coal dust exposure, Employer's Exhibits 1, 4, in conjunction with the previously submitted evidence. In evaluating Dr. Ranavaya's opinion, the administrative law judge determined that the physician based his diagnosis of pneumoconiosis on his examination of the miner in 2001, without reviewing any other medical opinions or medical evidence since that examination. Decision and Order at 8. Noting that Dr. Ranavaya was the only physician of record who was not a pulmonologist, the administrative law judge permissibly found that, while the physician's opinion was well-reasoned and documented, it remained essentially the same as his prior opinion. The administrative law judge concluded that the opinion was entitled to diminished weight because it was based on "far less extensive documentation than [the opinions of] either Dr. Zaldivar or Dr. Basheda," and because Dr. Ranavaya "admittedly

[6] On October 20, 2006, a bronchial washing was performed with lung and lymph node biopsies indicating "positive for malignant cells; non-small cell carcinoma." Claimant's Exhibit 2.

reviewed no additional materials for his recent deposition, despite the fact the miner lived many years beyond the date of his 2001 examination."[7] Decision and Order at 11; *see Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(en banc). Similarly, after determining that Dr. Baker based his opinion exclusively on his April 10, 2004 examination of the miner, and that Dr. Kowalti provided very little analysis on the issues of legal pneumoconiosis and disability causation, the administrative law judge permissibly found, as he did in his previous decision, that their opinions were entitled to little weight. Decision and Order at 4, 11; Claimant's Brief at 28; Claimant's Exhibit 2; Director's Exhibits 81, 117; *see Hicks*, 138 F.3d at 532-533 n.9, 21 BLR at 2-335 n.9; *Clark*, 12 BLR at 1-155; *Lucostic v. United States Steel Corp.*, 8 BLR 1-46, 1-47 (1985). By contrast, the administrative law judge determined that, unlike Dr. Ranavaya, Drs. Zaldivar, Crisalli, and Basheda all possessed superior qualifications as Board-certified internists and pulmonary specialists, and that Drs. Zaldivar and Basheda reviewed extensive medical documentation before excluding any relationship between the miner's respiratory impairment and his coal mine employment. Decision and Order at 11; Employer's Exhibits 1, 4, 5; Director's Exhibits 12, 99, 124. Finding that the opinion of Dr. Zaldivar, as supported by the opinions of Drs. Crisalli and Basheda,[8] was the best reasoned and documented, the administrative law judge properly concluded that it was entitled to the greatest weight. Decision and Order at 11; *see Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988).

Because the administrative law judge permissibly discounted the only medical opinion evidence of record supportive of claimant's burden, we affirm the administrative law judge's finding that claimant failed to establish legal pneumoconiosis at Section 718.202(a)(4), as supported by substantial evidence. Consequently, we affirm the administrative law judge's denial of modification pursuant to 20 C.F.R. §725.310 and his denial of benefits.

[7] When asked at his deposition if he had any records after his 2001 examination of the miner, Dr. Ranavaya stated "no sir. I have no records after that." Claimant's Exhibit 1 at 50.

[8] The administrative law judge determined that the probative value of Dr. Basheda's opinion was somewhat diminished because his conclusions regarding FEV_1 loss and asthma were inconsistent with the prevailing medical science contained in the preamble to the revised regulations. Decision and Order at 11-12; 65 Fed. Reg. 79,939-79,941 (Dec. 20, 2000).

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