BRB No. 13-0505 BLA

LINDA CHRISTIAN (o/b/o JACKIE D. CHRISTIAN) Claimant-Respondent v. ENERGY DEVELOPMENT CORPORATION and RUHRKOHL TRADING CORPORATION Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 07/18/2014 DECISION and ORDER

Appeal of the Decision and Order on Remand – Award of Benefits of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

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

William S. Mattingly and Tiffany B. Davis (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order on Remand – Award of Benefits (2010-BLA-5202) of Administrative Law Judge Thomas M. Burke rendered on a miner's claim[1] filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012)(the Act). This case, filed on March 9, 2004, is before the Board for the second time.[2]

In the initial decision, Administrative Law Judge Richard A. Morgan credited the miner with at least thirteen years of coal mine employment, and adjudicated the claim pursuant to 20 C.F.R. Part 718. Judge Morgan found that, although the evidence was sufficient to establish a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b), it was insufficient to establish either clinical or legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a), or disability causation pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits were denied.

On August 13, 2007, the miner filed a timely request for modification pursuant to 20 C.F.R. §725.310. Administrative Law Judge Thomas M. Burke (the administrative law judge) found the existence of clinical pneumoconiosis[3] established pursuant to Section 718.202(a), and granted the modification request, on the basis that a mistake in a determination of fact had been made pursuant to Section 725.310. Considering the claim *de novo*, the administrative law judge found that the evidence established the existence of clinical pneumoconiosis arising out of coal mine employment, total respiratory disability, and disability causation pursuant to 20 C.F.R. §§718.202(a), 718.203(b), and 718.204(b), (c). Consequently, the administrative law judge awarded benefits.

[1] Claimant is the widow of the miner, who died on April 3, 2008, and is pursuing the claim on his behalf. Claimant's Exhibit 3.

[2] The recent amendments to the Act, which became effective on March 23, 2010, do not apply to the present claim, as it was filed prior to January 1, 2005. Director's Exhibit 2.

[3] 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).

On appeal, the Board affirmed the administrative law judge's findings that the evidence established at least thirteen years of coal mine employment and total respiratory disability at Section 718.204(b), but vacated his findings of clinical pneumoconiosis and disability causation at Sections 718.202(a), 718.204(c), and his finding that modification was established at Section 725.310. The Board remanded the case for the administrative law judge to reassess and weigh the autopsy evidence, and then reweigh all relevant evidence together on the issue of clinical pneumoconiosis at Section 718.202(a), and redetermine whether disability causation was established at Section 718.204(c). The Board additionally instructed the administrative law judge to determine whether granting modification pursuant to Section 725.310 would render justice under the Act. Accordingly, the Board remanded the case for further findings and consideration of the appropriate relevant evidence in accordance with the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a). *Christian v. Energy Dev. Corp*., BRB No. 12-0099 BLA (Nov. 26, 2012)(unpub.).

On remand, the administrative law judge reconsidered the evidence and found it sufficient to establish clinical pneumoconiosis at Section 718.202(a), disability causation at Section 718.204(c), and a mistake in a determination of fact pursuant to Section 725.310. The administrative law judge further determined that granting modification would render justice under the Act. Consequently, the administrative law judge awarded benefits.

In the present appeal, employer challenges the administrative law judge's weighing of the evidence in finding it sufficient to establish the existence of clinical pneumoconiosis at Section 718.202(a) and disability causation at Section 718.204(c). Employer contends that the administrative law judge mischaracterized the medical opinion and treatment record evidence; that he selectively analyzed the physicians' credentials; and that he failed to weigh the evidence in a manner consistent with the Board's remand instructions, prevailing case law, and the APA. Claimant responds in support of the award of benefits. Employer has replied in support of its position. The Director, Office of Workers' Compensation Programs, has declined to file a substantive 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.[4] 33 U.S.C. §921(b)(3), as incorporated by 30

[4] 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); Decision and Order at 17 n. 5; 2007 Hearing Transcript at 9.

U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In a miner's claim, the administrative law judge may grant modification based on either a change in conditions or a mistake in a determination of fact. 20 C.F.R. §725.310(a). When a request for modification is filed, "any mistake may be corrected [by the administrative law judge], including the ultimate issue of benefits eligibility." *Betty B Coal Co. v. Director, OWCP* [*Stanley*], 194 F.3d 491, 497, 22 BLR 2-1, 2-11 (4th Cir. 1999); *see Jessee v. Director, OWCP*, 5 F.3d 723, 725, 18 BLR 2-26, 2-28 (4th Cir. 1993); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993).

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 is supported by substantial evidence, consistent with applicable law, and contains no reversible error. After noting that clinical pneumoconiosis had been established by the x-ray evidence at Section 718.202(a)(1),[5] the administrative law judge reconsidered, consistent with the Board's instructions, the relevant autopsy evidence at Section 718.202(a)(2). Decision and Order on Remand at 2, 6-7; Decision and Order Granting Request for Modification at 17-18. The administrative law judge reviewed the pathological opinions of Drs. Dennis and Perper, that the miner had coal workers' pneumoconiosis, and the contrary opinions of Drs. Caffrey and Oesterling, that clinical pneumoconiosis was not evidenced on the autopsy slides, and determined that the physicians' findings cannot be reconciled "other than by examining their qualifications or credibility." Decision and Order on Remand at 6; Employer's Exhibits 1, 2, 3; Claimant's Exhibits 1, 2. The administrative law judge permissibly determined that the opinion of Dr. Dennis,[6] the autopsy prosector, lacked credibility and was entitled to no weight, because his medical license had been suspended. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(en banc); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-22 (1987); Decision and Order on Remand at 6. Within a proper exercise of his discretion, the administrative law judge accorded greater weight to the opinion of Dr.

[5] We affirm, as unchallenged on appeal, the administrative law judge's findings that the x-ray evidence established the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1), and that granting modification pursuant to 20 C.F.R. §725.310 would render justice under the Act. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[6] Dr. Dennis performed an autopsy on April 4, 2008, and diagnosed coal workers' pneumoconiosis, a weakened lung, and fibrosis. Employer's Exhibit 1.

Perper,[7] based upon his status as the "most qualified" of the three pathologists, with an additional pathological Board certification, and his "superior academic qualifications." Decision and Order on Remand at 7. While acknowledging that all three physicians are Board-certified pathologists,[8] the administrative law judge credited Dr. Perper's current teaching affiliations with universities and medical schools[9] over the teaching appointments of Dr. Oesterling, who last taught medical students and residents from 1962 to 1968,[10] and Dr. Caffrey, who "has not had any association with hospitals or academic institutions since the mid-1990's."[11] Decision and Order on Remand at 7. As the fact-finder's inferences and credibility assessments shall be given deference, the administrative law judge permissibly accorded greater weight to the opinion of Dr. Perper, based upon his Board certifications and current academic affiliations. *Newport News Shipbldg. & Dry Dock Co. v. Tann*, 841 F.2d 540, 543 (4th Cir. 1988); *Clark*, 12 BLR at 1-155; *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988). The Board will not

[7] Dr. Perper diagnosed simple clinical coal workers' pneumoconiosis, primarily of the interstitial fibro-anthracotic type with macules and micronodules; severe centrilobular emphysema and panacinar emphysema, sclerosis of small intrapulmonary vessels consistent with pulmonary hypertension and cor pulmonale, and a few small, fresh, pulmonary thrombo-emboli. Dr. Perper found anthracotic macules and pneumoconiotic fibro-anthracotic micronodules containing birefringent silica crystals and measuring from 1.0 to 4.0 mm. Claimant's Exhibit 1 at 24-25.

[8] Dr. Perper is Board-certified in surgical, anatomical, and forensic pathology. Claimant's Exhibit 1. Dr. Oesterling is Board-certified in anatomical and clinical pathology and nuclear medicine. Employer's Exhibit 4. Dr. Caffrey is Board-certified in anatomical and clinical pathology. Employer's Exhibit 4.

[9] Dr. Perper is a clinical professor of biomedical science at Florida Atlantic University; a clinical professor of epidemiology and public health at Nova Southeastern University College of Medicine; and a clinical professor of pathology, epidemiology and public health at the University of Miami School of Medicine. He also served as Chief Medical Examiner of Broward County, Florida from 1994. Claimant's Exhibit 1.

[10] Dr. Oesterling taught pathology to medical students at Jefferson Medical College Hospital from 1962 to 1966 and residented in pathology at Altoona General Hospital in Pennsylvania from 1966 to 1968. Employer's Exhibit 7 at 10.

[11] Dr. Caffrey was an assistant clinical professor of pathology at the University of Kentucky School of Medicine from 1965-1994 and chairman of the pathology department at Central Baptist Hospital in Kentucky from 1967-1992. Employer's Exhibit 4.

interfere with credibility determinations unless they are inherently incredible or patently unreasonable. *See Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988); *Calfee v. Director, OWCP*, 8 BLR 1-7, 1-10 (1985). As substantial evidence supports the administrative law judge's credibility determinations, we affirm his finding that clinical pneumoconiosis was established by the autopsy evidence at Section 718.202(a)(2).

Employer next asserts that the administrative law judge mischaracterized the medical opinions of Drs. Zaldivar and Crisalli and the treatment records at Section 718.202(a)(4), and failed to weigh all relevant evidence together regarding the existence of clinical pneumoconiosis at Section 718.202(a). Employer's arguments lack merit. Noting that Dr. Gaziano diagnosed clinical pneumoconiosis based on his x-ray reading, while Dr. Crisalli "found no evidence of pneumoconiosis based on a negative [x-ray] reading" and "Dr. Zaldivar rejected clinical pneumoconiosis after he reviewed the pathology reports and radiographic reports," the administrative law judge correctly noted that the weight of these reports could not show the absence of clinical pneumoconiosis, as they were based on x-ray evidence[12] and autopsy evidence that the administrative law judge determined was positive for pneumoconiosis. Decision and Order on Remand at 8; Employer's Exhibits 5, 8; Director's Exhibit 47; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997). Thus, any error committed by the administrative law judge in stating that "the three physicians diagnosed clinical pneumoconiosis" is harmless, as he correctly found that neither Dr. Crisalli nor Dr. Zaldivar diagnosed pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Decision and Order on Remand at 8. Lastly, the administrative law judge found that the treatment records, including the treatment x-rays and CT scan, "neither establish nor negate the presence of pneumoconiosis." Decision and Order on Remand at 8.

[12] Dr. Crisalli relied on Dr. Willis's negative interpretation of the January 16, 2006 x-ray, which the administrative law judge determined was in equipoise, as Dr. Alexander read the same film as positive for pneumoconiosis and both Dr. Willis and Dr. Alexander are dually qualified as Board-certified radiologists and B readers. Decision and Order Granting Request for Modification at 18. The administrative law judge determined that the June 9, 2004 x-ray was positive for pneumoconiosis, as Dr. Zaldivar's negative interpretation was outweighed by Dr. Alexander's positive interpretation, based on Dr. Alexander's dual qualifications and Dr. Zaldivar's status as a B reader. *Id.* Thus, contrary to employer's contention, the administrative law judge's erroneous statement, that Dr. Zaldivar "did not review the slides or x-rays," is harmless, as Dr. Zaldivar relied on a negative x-ray interpretation and the negative autopsy findings of Drs. Caffrey and Oesterling, which the administrative law judge found to be outweighed by the positive findings. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); Director's Exhibit 47, 57 at 11; Claimant's Exhibits 13, 14; Employer's Exhibit 5.

Accordingly, the administrative law judge permissibly found that the weight of all record evidence at Section 718.202(a) supported a finding of clinical pneumoconiosis, based on the positive x-ray and autopsy evidence and the medical opinion and treatment records that did not negate the presence of pneumoconiosis. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 208, 22 BLR 2-162, 2-169 (4th Cir. 2000); *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 25, 21 BLR 2-104, 2-111 (3d Cir. 1997). Consequently, we affirm, as supported by substantial evidence, the administrative law judge's finding of clinical pneumoconiosis at Section 718.202(a).

We next address employer's contention that, in considering the cause of the miner's disabling impairment pursuant to Section 718.204(c), the administrative law judge did not comply with the requirements of the APA, because he failed on remand to reweigh the relevant evidence of record. Employer maintains that the administrative law judge's reliance on his 2011 disability causation finding was error, given that Dr. Dennis's opinion was discredited on remand and could not corroborate Dr. Gaziano's opinion, that the miner's disabling impairment was due to pneumoconiosis. Employer's Brief at 10-11. Employer's argument is without merit. The administrative law judge permissibly discounted the opinions of Drs. Caffrey, Oesterling, Zaldivar and Crisalli, that the miner's disability is unrelated to pneumoconiosis, because they did not diagnose pneumoconiosis, contrary to the administrative law judge's finding. *See Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995); *Hobbs v. Clinchfield Coal Co*., 45 F.3d 819, 19 BLR 2-86 (4th Cir. 1995); *Toler v. Eastern Associated Coal Corp*., 43 F.3d 109, 19 BLR 2-709 (4th Cir. 1995). The administrative law judge relied on Dr. Gaziano's opinion,[13] as corroborated by the pathology reports of Drs. Perper and Dennis diagnosing severe pneumoconiosis, to support his finding that the evidence established that pneumoconiosis was a substantial contributing cause of the miner's disabling respiratory impairment at Section 718.204(c). Decision and Order on Remand at 8; Decision and Order Granting Modification at 22. Since the administrative law judge properly relied on the opinion of Dr. Gaziano, as supported by the opinion of Dr. Perper, to find disability causation established, any error in additionally noting that Dr. Dennis's discredited opinion supported that of Dr. Gaziano, is harmless. *See Larioni*, 6 BLR at 1-1278. As substantial evidence supports the administrative law judge's weighing of the evidence, we affirm his finding that claimant established disability causation at Section 718.204(c), and a basis for modification at Section 725.310. Consequently, we affirm the administrative law judge's award of benefits.

[13] Dr. Gaziano performed the Department of Labor examination, and opined that, while the miner's congestive heart disease severely impaired him, the miner's coal workers' pneumoconiosis and chronic obstructive pulmonary disease due to smoking were contributing causes of the miner's totally disabling respiratory impairment. Director's Exhibit 14.

Accordingly, the administrative law judge's Decision and Order on Remand – Award of Benefits is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge