BRB No. 13-0583 BLA

LORETTA DANIELS, o/b/o CONLEY DANIELS	)	
Claimant-Petitioner	)	
v.	)	
LEECO INCORPORATED	)	
and	)	
JAMES RIVER SERVICES COMPANY/ JAMES RIVER COAL COMPANY	)	DATE ISSUED: 07/17/2014
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 Denying Benefits on Modification of John P. Sellars, III, Administrative Law Judge, United States Department of Labor.

Loretta Daniels, Bennyman, Kentucky, *pro se*.

Lois A. Kitts and James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer/carrier.

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

PER CURIAM:

Claimant,[1] without the assistance of counsel, appeals the Decision and Order Denying Benefits on Modification (2011-BLA-5802) of Administrative Law Judge John P. Sellars, III (the administrative law judge) rendered on a miner's subsequent claim[2] filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011)(the Act).[3] The administrative law judge adjudicated the claim pursuant to 20 C.F.R. Parts 718 and 725, and credited the parties' stipulation that the miner worked in coal mine employment for sixteen years. After determining that Administrative Law Judge William S. Colwell found that new evidence submitted in support of the miner's subsequent claim established total respiratory disability pursuant to 20 C.F.R. §718.204(b), thereby establishing a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d), the administrative law judge reviewed the entire record to determine whether granting modification was appropriate pursuant to 20

[1] Claimant, Loretta Daniels, is the widow of the miner, Conley Daniels, who died on January 5, 2007. Director's Exhibit 56 at 12; Claimant's Exhibit 4. Claimant is pursuing the miner's claim on behalf of his estate. Claimant also filed a survivor's claim for benefits on January 29, 2007. However, on May 17, 2007, Administrative Law Judge William S. Colwell denied employer's request to consolidate the miner's claim and the survivor's claim for adjudication. Director's Exhibits 56, 57.

[2] The miner's first claim for benefits, filed on April 16, 1993, was ultimately denied by Administrative Law Judge Joseph E. Kane on February 3, 2003, for failure to establish total respiratory disability, Director's Exhibit 1 at 55, and the Board affirmed the denial of benefits. *Daniels v. Leeco, Inc.*, BRB No. 03-0486 BLA (Oct. 24, 2003) (unpub.); Director's Exhibit 1 at 2.

The miner filed a second claim for benefits on November 1, 2004. Director's Exhibit 3. While the claim was pending before the Office of Administrative Law Judges, the miner died on January 5, 2007. On January 30, 2008, Administrative Law Judge William S. Colwell denied benefits, finding that the evidence was sufficient to establish total respiratory disability and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §§718.204(b), 725.309(d), but insufficient to establish the existence of pneumoconiosis or disability causation pursuant to 20 C.F.R. §§718.202, 718.204(c). Director's Exhibit 60. The Board affirmed the denial of benefits. *Daniels v. Leeco, Inc.*, BRB No. 08-0418 BLA (Feb. 6, 2009)(unpub.); Director's Exhibit 1 at 80. Claimant, the miner's widow, filed a timely request for modification on January 13, 2010. Director's Exhibit 81.

[3] The recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply to this claim, since it was filed prior to January 1, 2005. 30 U.S.C. §921(c)(4).

C.F.R. §725.310. The administrative law judge found that the weight of the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Accordingly, benefits were denied.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law.[4] 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 pursuant to 20 C.F.R. Part 718 in a miner's claim, claimant must demonstrate by a preponderance of the evidence that the miner was 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 (1989).

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 modification of an award or denial of benefits, based on a change in conditions or a mistake in a determination of fact. 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, in conjunction with the previously submitted evidence, to determine if the weight of the new evidence is sufficient to establish at least one element of entitlement that defeated entitlement in the prior decision. *See 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). Mistakes of fact may be demonstrated by wholly new evidence, cumulative evidence, or merely upon further reflection on the evidence of record. *See O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971); *Jessee v. Director, OWCP*, 5 F.3d 723, 18

[4] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as the miner's last coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Director's Exhibit 4.

BLR 2-26 (4th Cir. 1993)*; King v. Jericol Mining, Inc*., 246 F.3d 822, 22 BLR 2-305 (6th Cir. 2001).

After consideration of the administrative law judge's Decision and Order Denying Benefits and the evidence of record, we conclude that the administrative law judge's decision is supported by substantial evidence, consistent with applicable law, and must be affirmed. Pursuant to Section 718.202(a)(1), after "giving the greatest weight to the most recent x-ray [by approximately eighteen months]," the administrative law judge found that the weight of the x-ray evidence, viewed in isolation, was positive for pneumoconiosis.[5] Decision and Order on Modification at 19; *see Orange v. Island Creek Coal Co.*, 786 F.2d 724, 8 BLR 2-192 (6th Cir. 1986). The administrative law judge noted, however, that Dr. West, who interpreted the most recent x-ray of August 15, 2006 as positive for pneumoconiosis, also interpreted a CT scan of the same date and opined that it showed no evidence of pneumoconiosis. Decision and Order on Modification at 19.

The administrative law judge then reviewed the remaining relevant evidence of record. Pursuant to Section 718.202(a)(2), the biopsy evidence consisted of the January 4, 2007 report of Dr. Mesia, who diagnosed pneumonia and possible carcinoma but made no mention of pneumoconiosis, and the October 22, 2007 report of Dr. Oesterling, who found that, while the pathological slides from the biopsy were inadequate to assess the presence or absence of pneumoconiosis, the limited materials that were available demonstrated no pneumoconiosis. Claimant's Exhibit 2; Employer's Exhibit 3. Hence, the administrative law judge correctly found that the biopsy evidence was insufficient to affirmatively establish the existence of clinical pneumoconiosis. *See* 20 C.F.R. §718.202(a)(2); Decision and Order on Modification at 21.

Likewise, the administrative law judge evaluated the autopsy reports of Drs. Mesia and Oesterling and, within a rational exercise of his discretion, found it insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(2). Dr. Mesia performed the autopsy on January 8, 2007 and, on gross examination, described emphysematous changes most prominent in the lower portion of the middle lobe of the right lung and lower lobes of both lungs, as well as black pigments in all lobes of the lung parenchyma, resulting in a mottled pleural surface. On microscopic examination, Dr. Mesia observed

[5] According greater weight to the interpretations of the physicians with superior qualifications, the administrative law judge determined that the January 26, 2005 x-ray was inconclusive; the January 27, 2005 x-ray was negative for pneumoconiosis; and the August 15, 2006 x-ray was positive for pneumoconiosis. Decision and Order on Modification at 19; Director's Exhibits 15, 48A at 113, 118; *see Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47 (2004)(en banc).

"bronchiectasis involving all lobes of the lungs associated with extensive interstitial fibrosis and extensive emphysematous changes of the alveoli;" severe bronchopneumonia in both lungs; moderately differentiated squamous cell carcinoma in both lungs and in the peribronchial lymph node; organizing thrombus in the right pulmonary artery and right lower lobe; moderate atherosclerosis with calcifications in the thoracic aorta; and she stated that the lung parenchyma "also showed simple coal workers' pneumoconiosis." Decision and Order on Modification 20; Claimant's Exhibit 1. Despite finding that Dr. Mesia possesses "excellent credentials" as a Board-certified anatomic and clinical pathologist, the administrative law judge permissibly concluded that her diagnosis of simple coal workers' pneumoconiosis was entitled to little weight, as the administrative law judge was unable to discern whether Dr. Mesia based her diagnosis upon the mere presence of anthracotic pigmentation. *Id.*; *see Dobrosky v. Director, OWCP*, 4 BLR 1-680 (1982). The administrative law judge recognized that Dr. Oesterling possesses credentials that "are at least equal to those of Dr. Mesia," as he is Board-certified in nuclear medicine, anatomic pathology, and clinical pathology. Dr. Oesterling's review of the twelve histologic slides revealed "very mild pleural anthracotic pigmentation" insufficient to justify a diagnosis of coal workers' pneumoconiosis; severe organizing chronic bronchopneumonia unrelated to the miner's coal dust inhalation; and multiple primary carcinomas with metastases throughout the lungs and regional lymph nodes. Employer's Exhibit 2. While both Drs. Mesia and Oesterling similarly observed the presence of "bronchiectasis associated with fibrosis as well as squamous cell cancer," the administrative law judge rationally found that the weight of the autopsy evidence was insufficient to affirmatively establish the existence of pneumoconiosis because neither pathologist attributed these conditions to the miner's coal dust exposure. Decision and Order on Modification at 21; Claimant's Exhibit 1; Employer's Exhibit 2. Ultimately, the administrative law judge permissibly found that the opinion of Dr. Oesterling was more persuasive than that of Dr. Mesia, because Dr. Oesterling fully explained his conclusion that the miner's fibrosis was due to severe bronchiectasis and chronic organizing hemorrhagic pneumonia, and that the very mild pleural anthracotic pigmentation observed did not constitute pneumoconiosis due to an absence of structural changes consistent with coal dust exposure. Decision and Order on Modification at 21; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(en banc); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985). Hence, we affirm the administrative law judge's finding that the autopsy evidence was insufficient to affirmatively establish the existence of pneumoconiosis at Section 718.202(a)(2).

Next, the administrative law judge correctly determined that claimant cannot establish the existence of pneumoconiosis pursuant to Section 718.202(a)(3), as none of the presumptions set forth therein is applicable to this case. A review of the record reveals no evidence of complicated pneumoconiosis, *see* 20 C.F.R. §718.304; this claim was not filed within the requisite time limitations, *see* 20 C.F.R. §718.305; and this claim is not a survivor's claim, *see* 20 C.F.R. §718.306. Decision and Order on Modification at

22. As substantial evidence supports the administrative law judge's findings thereunder, they are affirmed.

We also affirm, as supported by substantial evidence, the administrative law judge's finding that the CT scan evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.107, because the two CT scans of record, dated January 27, 2005 and August 15, 2006, were uniformly interpreted by Drs. Repsher and West, respectively, as negative for pneumoconiosis. Decision and Order on Modification at 21-22; Director's Exhibits 48A at 115, 48 at 93.

Next, pursuant to Section 718.202(a)(4), the administrative law judge evaluated the medical opinions submitted in support of modification by the miner's treating physicians, Drs. George Chaney and James Chaney. Considering the factors at 20 C.F.R. §718.104(d), the administrative law judge permissibly declined to accord preferential weight to the opinions, as Dr. George Chaney regularly treated the miner over a period of five years primarily for back pain, and Dr. James Chaney only treated the miner during the two months preceding his death. Decision and Order on Modification at 22-23; *see Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002). While both physicians opined that the miner suffered from coal workers' pneumoconiosis, the administrative law judge noted that neither doctor specified whether the miner suffered from either clinical pneumoconiosis or legal pneumoconiosis, or from both forms of pneumoconiosis.[6] Decision and Order on Modification at 22; Director's Exhibit 81 at 2, 3. The administrative law judge also could not determine whether these physicians were qualified to render a diagnosis, as the record did not contain their qualifications, and they were not listed on the website of the American Board of Medical Specialties. Decision and Order on Modification at 23; *see J.V.S.* [*Stowers*] *v. Arch of West Virginia*, 24 BLR 1-78, 1-96 (2008). Further, the administrative law judge determined that neither doctor indicated what information he relied upon to support his conclusion. Decision and Order on Modification at 22; *see York v. Jewell Ridge Coal Corp.*, 7 BLR 1-766, 1-770 (1985). The administrative law judge noted that Dr. George Chaney additionally diagnosed emphysema, but did not address whether the condition was related to coal dust exposure.

[6] Clinical pneumoconiosis is defined as "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." 20 C.F.R. §718.201(a)(1). Legal pneumoconiosis "includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). This definition encompasses any chronic respiratory or pulmonary disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

See Stowers, 24 BLR at 1-96, n.17. He also listed coal worker's pneumoconiosis as a contributing cause of death on the miner's death certificate, but provided no explanation for this conclusion, and his records contained no x-rays or pulmonary function tests. Decision and Order on Modification at 23; Director's Exhibit 14; Claimant's Exhibit 4; *see Addison v. Director, OWCP*, 11 BLR 1-68 (1988). Thus, the administrative law judge acted within his discretion in finding that the opinion was insufficiently documented and reasoned, and was insufficient to establish the existence of either clinical or legal pneumoconiosis at Section 718.202(a)(4). Decision and Order on Modification at 23; *see Moseley v. Peabody Coal Co.*, 769 F.2d 357, 8 BLR 2-22 (6th Cir. 1985); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Similarly, the administrative law judge reviewed the treatment records of Dr. James Chaney, and determined that, although they contained x-rays and CT scans showing evidence of chronic obstructive pulmonary disease and pulmonary fibrosis, there was no definitive diagnosis of pneumoconiosis. Rather, Dr. James Chaney indicated that the mass present on the x-rays and CT scans was "probably" from pneumoconiosis, but that he could not rule out a malignancy. Decision and Order on Remand at 23; Claimant's Exhibit 3; *see Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988). As the administrative law judge could not discern whether the physician was qualified to review this evidence for the purpose of diagnosing pneumoconiosis, and as the autopsy revealed multiple primary carcinomas with metastases, the administrative law judge permissibly concluded that the opinion of Dr. James Chaney was inadequately documented and insufficiently reasoned to support a finding of clinical or legal pneumoconiosis at Section 718.202(a)(4). Decision and Order on Modification at 23; *see Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983).

Turning to the earlier evidence, the administrative law judge reviewed the evidence from the miner's initial claim, and concurred with Administrative Law Judge Joseph E. Kane's finding that it was insufficient to establish either clinical or legal pneumoconiosis. Decision and Order on Modification at 25, 28. With regard to the evidence submitted in support of the miner's subsequent claim, the administrative law judge reviewed the medical opinions of Drs. Repsher and Rosenberg, who found no pneumoconiosis, and the opinion of Dr. Rasmussen, who diagnosed both clinical and legal pneumoconiosis. Decision and Order on Modification at 11-15, 23-24. In evaluating the opinion of Dr. Rasmussen, the administrative law judge determined that the physician diagnosed clinical pneumoconiosis based, in part, on a positive x-ray interpretation. Decision and Order on Modification at 23; Director's Exhibit 15. As an equally qualified reader interpreted the same x-ray as negative for pneumoconiosis, the administrative acknowledged that he had found this x-ray to be inconclusive, and that he had found the weight of the x-ray evidence to be positive for pneumoconiosis, based on Dr. West's positive interpretation of the most recent x-ray dated August 16, 2006. However, as Dr. West also interpreted a CT scan of the same date as negative for pneumoconiosis, the administrative law judge acted within his discretion in crediting Dr.

Rosenberg's testimony, that CT scans constituted the superior diagnostic technology, and in finding that it outweighed the positive x-ray evidence. Decision and Order on Modification at 23-24; Director's Exhibit 48A at 93, 115; *see Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(en banc). Moreover, since he determined that the more persuasive autopsy evidence was negative for pneumoconiosis, the administrative law judge permissibly discounted Dr. Rasmussen's diagnosis of clinical pneumoconiosis at Section 718.202(a)(4), *see Terlip v. Director, OWCP*, 8 BLR 1-363 (1985), and found that the weight of the relevant evidence of record considered as a whole was negative for clinical pneumoconiosis at Section 718.202(a). Decision and Order on Modification at 25; *see Dixie Fuel Co. v. Director, OWCP* [*Hensley*], 700 F.3d 878, 25 BLR 2-213 (6th Cir. 2012).

With regard to Dr. Rasmussen's diagnosis of legal pneumoconiosis, based upon his finding of a restrictive ventilatory impairment, the administrative law judge acknowledged that the physician had an extensive background in evaluating and treating coal miners, and relied upon essentially accurate employment and smoking histories. Decision and Order on Modification at 26. However, in weighing Dr. Rasmussen's opinion against that of Dr. Rosenberg, who attributed the miner's restrictive impairment and low diffusing capacity to linear interstitial lung disease unrelated to coal dust exposure, the administrative law judge determined that Dr. Rosenberg possessed superior Board certifications, as he was Board-certified in internal and pulmonary medicine. Further, Dr. Rosenberg's opinion that the miner did not have clinical pneumoconiosis was consistent with the administrative law judge's finding that the weight of the evidence did not support a finding of clinical pneumoconiosis. Decision and Order on Modification at 27; *see Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). In view of the foregoing, and as he found that Dr. Rosenberg relied upon essentially accurate employment and smoking histories, and reviewed more extensive medical records in addition to his physical evaluation of the miner, the administrative law judge acted within his discretion in according Dr. Rosenberg's opinion greater weight. *Id.*; *see Hall v. Director, OWCP*, 9 BLR 1-193 (1985). Lastly, while noting that the record contained extensive evidence of emphysema, and that emphysema can be caused by coal dust exposure, the administrative law judge determined that this evidence was insufficient to establish legal pneumoconiosis, as no physician attributed the emphysema to coal dust exposure. Decision and Order on Modification at 27; *see Stowers*, 24 BLR at 1-96, n.17. Thus, the administrative law judge concurred with Judge Colwell's finding that the overall weight of the evidence failed to demonstrate that the miner suffered from either clinical or legal pneumoconiosis, and he rationally concluded that the record did not demonstrate that the miner contracted pneumoconiosis subsequent to Judge Colwell's decision. Decision and Order on Modification at 28. As substantial evidence supports the administrative law judge's credibility determinations, we affirm his denial of modification pursuant to Section 725.310, and his determination that entitlement to benefits is precluded in the miner's claim. *See Anderson*, 12 BLR at 1-114.

Accordingly, the administrative law judge's Decision and Order Denying Benefits on Modification 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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JUDITH S. BOGGS
Administrative Appeals Judge