BRB No. 97-1524 BLA

OTIS ELSWICK	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LITTLE ROCK COAL COMPANY	)	
	)	
Employer-Respondent	)	DATE ISSUED:
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	DECISION AND ORDER
Party-in-Interest		

Appeal of the Decision and Order of John C. Holmes, Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts, Pikeville, Kentucky, for claimant.

Mark E. Solomons (Arter & Hadden), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (95-BLA-1287) of Administrative Law Judge John C. Holmes denying benefits 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). The relevant procedural history of this case is as follows: Claimant filed an application for benefits on December 18, 1980. This claim was denied by the district director on July 23, 1981. Claimant filed a second claim on February 2, 1984, which was denied on July 19, 1984. Upon claimant's request, a hearing was held before Administrative Law Judge Charles W. Campbell. On June 14, 1990, Judge Campbell issued a Decision and Order in which he denied benefits on the ground that claimant failed to prove that he was totally disabled pursuant to 20 C.F.R. §718.204(c). Director's Exhibit 146. Claimant appealed to the Board, which affirmed the denial of benefits in a Decision and Order issued on May 28, 1992. *Elswick v. Little Rock Coal Co.*, BRB No. 90-1715 BLA (May 28, 1992)(unpublished); *see* Director's Exhibit 159.

Claimant filed a request for modification on August 12, 1992, and submitted new x-ray evidence. The district director determined that the newly submitted evidence did not demonstrate a change in conditions or a mistake of fact pursuant to 20 C.F.R. §725.310. The case was then transferred to Judge Campbell who denied the request for modification in a Decision and Order issued on July 16, 1993. Director's Exhibit 174. Claimant again appealed to the Board. While this appeal was pending, claimant filed a motion in which he asked the Board to remand the case for consideration of new x-ray evidence. The Board dismissed claimant's appeal and returned the case to the district director for processing of claimant's motion as a request for modification under Section 725.310. *Elswick v. Little Rock Coal Co.*, BRB No. 93-2114 BLA (Nov. 15, 1993) (unpublished Order); *see* Director's Exhibit 180. The district director denied the modification request and transferred the case to the Office of Administrative Law Judges.

The case was assigned to Administrative Law Judge John C. Holmes (the administrative law judge), who rejected claimant's request for a hearing and determined that the newly submitted evidence did not support a finding of a change in conditions pursuant to Section 725.310. Claimant filed another appeal with the Board. In a Decision and Order issued on January 29, 1997, the Board affirmed the administrative law judge's denial of claimant's request for a hearing on modification. The Board vacated, however, the administrative law judge's findings under Section 725.310 on the ground that he discussed only the newly submitted evidence of record. *Elswick v. Little Rock Coal Co.*, BRB No. 96-0350 BLA (Jan. 29, 1997)(unpublished) (McGranery, J., concurring and dissenting).[1] The Board also held that in light of the decision of the United States Court of Appeals for the Sixth Circuit in *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994), the administrative law judge should have determined whether the previous denial of benefits contained a mistake in a determination of fact. Finally, the Board modified its prior Decision and Order by vacating Judge Campbell's finding that claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) based upon the application of the true doubt rule. The case was remanded to the administrative law judge for reconsideration.

[1]Judge McGranery stated in her dissent that she would hold that the administrative law judge on remand was required to hold a hearing on claimant's petition for modification in accordance with his request. *Elswick v. Little Rock Coal Co.*, BRB No. 96-0350 BLA (Jan. 29, 1997)(unpublished) (McGranery, J., concurring and dissenting), *slip opinion* at 5-6.

On remand, the administrative law judge determined that the newly submitted evidence, when considered with the previously submitted evidence of record, was insufficient to establish that claimant has pneumoconiosis or is totally disabled pursuant to 20 C.F.R. §§718.202(a)(1)-(4) and 718.204(c)(1)-(4). Accordingly, benefits were denied. Claimant filed the present appeal, asserting in general terms that the administrative law judge did not properly weigh the evidence of record. Employer has responded and urges affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in 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 applicable 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).

In order to establish entitlement to benefits under 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986)(*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

As an initial matter, we note that the present case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment occurred in Virginia. Director's Exhibit 2; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*). In its most recent Decision and Order, therefore, the Board indicated incorrectly that the law of the United States Court of Appeals for the Sixth Circuit constitutes binding precedent in this case with respect to the administrative law judge's consideration of the evidence relevant to Section 725.310. *Elswick v. Little Rock Coal Co.*, BRB No. 96-0350 BLA (Jan. 29, 1997)(unpublished), *slip opinion at 2, 4*. The Board's application of the modification standard adopted by the United States Court of Appeals for the Fourth Circuit in *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993), would not have resulted in a different outcome, however, as both *Worrell* and *Jessee* specify that a request for modification be broadly construed to allege both a change in conditions and a mistake in a determination of fact. Thus, we need not alter our prior holding vacating the administrative law judge's findings under Section 725.310 and remanding for reconsideration of the relevant evidence. In addition, we will not modify our prior holding that, under the law of the Sixth Circuit, an administrative law judge is not required to give more weight to the opinion of claimant's treating physician, inasmuch as the Fourth Circuit also does not require that an administrative law judge defer to a treating physician's opinion. *Elswick*, *supra*, *slip opinion at 2*; *see Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997).

Turning to claimant's present appeal, we affirm the administrative law judge's Decision and Order denying benefits, inasmuch as claimant has not raised any meritorious allegations of error. The bulk of claimant's brief consists of general assertions that the administrative law judge erred in failing to find that claimant established modification under Section 725.310 and in failing to find that claimant established the elements of entitlement under 20 C.F.R. Part 718. Claimant also states that there is sufficient x-ray evidence of pneumoconiosis and sufficient medical opinion evidence to establish the existence of pneumoconiosis and that claimant is totally disabled due to pneumoconiosis. We decline to address these assertions. Inasmuch as claimant has not identified a specific factual or legal error in the administrative law judge's findings, claimant has not properly invoked Board review of these findings. *See Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

Claimant does allege specifically that the administrative law judge should have given greater weight to the medical reports submitted by Dr. Sutherland based upon his status as one of claimant's treating physicians. Claimant also argues that the administrative law judge should have accorded more weight to the opinions of Drs. Clarke, Modi, and Sutherland on the ground that they examined claimant on more than one occasion. In a related contention, claimant maintains that the administrative law judge erred in crediting the medical reports of physicians who have only examined claimant once or who only reviewed the medical evidence of record. We reject these arguments.

With respect to Dr. Sutherland's reports, as indicated above, although the administrative law judge could, in the exercise of his discretion as fact-finder, accord additional weight to Dr. Sutherland's opinion based upon his status as a treating physician, the administrative law judge is not required to do so. *See Akers*, *supra*; *Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Burns v. Director, OWCP*, 7 BLR 1-597 (1984). Inasmuch as claimant has not alleged any other error in the administrative law judge's consideration of Dr. Sutherland's reports, we decline to vacate the administrative law judge's determination that Dr. Sutherland's opinion does not support a finding of pneumoconiosis or total disability under Sections 718.202(a)(1)-(4) and 718.204(c)(1)-(4).

Claimant's contentions regarding the administrative law judge's treatment of the medical reports of the physicians who examined claimant on more than one occasion, and the reports of the physicians who did not examine claimant, are also without merit. While it is permissible for an administrative law judge to accord additional weight to a doctor's opinion that is based upon numerous physical examinations, an administrative law judge is not required to do so. *See generally Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Hall v. Director, OWCP*, 8 BLR 1-193 (1985); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). With respect to the opinions of non-examining physicians, under the law of the United States Court of Appeals for the Fourth Circuit, an administrative law

judge may credit these opinions if the physicians do not base their conclusions upon matters that were not addressed by an examining physician. *See Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984); *see also Malcomb v. Island Creek Coal Co.*, 15 F.3d 364, 18 BLR 2-113 (4th Cir. 1994). In the present case, there is no indication, nor does claimant assert, that the opinions of the non-examining physicians violate the Fourth Circuit's holding with respect to this issue. We reject, therefore, claimant's contention.

Inasmuch as claimant has not identified any meritorious allegations of error with respect to the administrative law judge's determination that the evidence of record as a whole is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(4) or that claimant is totally disabled pursuant to Section 718.204(c)(1)-(4), essential elements of entitlement, we affirm these findings and the denial of benefits under Part 718. *See Trent*, *supra*; *Gee*, *supra*; *Perry*, *supra*.

Accordingly, the Decision and Order of the administrative law judge denying benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge