BRB No. 06-0695 BLA

MILFORD SHORT (Deceased)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WESTMORELAND COAL COMPANY	)	DATE ISSUED: 06/28/2007
	)	
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 Remand-Denying Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Ronald C. Cox (Atkins Law Office), Harlan, Kentucky, for claimant.

Natalie D. Brown (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

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

PER CURIAM:

Claimant[1] appeals the Decision and Order on Remand-Denying Benefits (2002-BLA-00330) of Administrative Law Judge Joseph E. Kane (the administrative law judge) on modification of 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).[2]

[1] Claimant died on May 10, 2002, while his claim was still pending. Claimant's widow is pursuing the claim.

[2] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became

When this case was most recently before the Board, pursuant to employer's appeal,[3] the Board vacated the administrative law judge's award of benefits and remanded the case

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effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[3] Claimant initially filed a claim for benefits with the Social Security Administration (SSA). That claim was denied by SSA in 1974 and 1979 and by the Department of Labor in 1980. No further action was taken on that claim.

Claimant filed a duplicate claim on July 15, 1992. Administrative Law Judge Charles P. Rippey found that a material change in conditions was established in that claim, because new evidence supported the existence of pneumoconiosis, *see* 20 C.F.R. §725.309(d) (2000). Judge Rippey, however, denied the claim because the record failed to establish total respiratory disability. 20 C.F.R. §718.204(c)(1)-(4) (2000). The Board affirmed that denial. *Short v. Westmoreland Coal Co.*, BRB No. 95-2041 BLA (Mar. 27, 1996) (unpub.).

Claimant subsequently requested modification of that denial by filing a third claim on September 18, 1996 within a year of the prior denial. Noting that the parties stipulated to the existence of pneumoconiosis, and finding that claimant was entitled to the presumption that his pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203(b) (2000), Administrative Law Judge Thomas F. Phalen found the evidence insufficient to establish total disability and total disability due to pneumoconiosis (disability causation) at 20 C.F.R. §718.204(b), (c) (2000). Judge Phalen also found that the evidence insufficient to establish complicated pneumoconiosis and, therefore, that claimant was precluded from establishing entitlement based on the irrebuttable presumption at 20 C.F.R. §718.304 (2000). Benefits were, accordingly, denied.

The Board affirmed the administrative law judge's finding that the evidence was insufficient to establish total disability at 20 C.F.R. §718.204(c)(1)-(3) (2000), as unchallenged on appeal, but vacated the denial and remanded the case for the administrative law judge to reconsider whether the medical opinion evidence established total disability and whether disability causation was established at 20 C.F.R. §718.204(b), (c) (2000). On remand, Judge Phalen found that total respiratory disability was established by new medical opinion evidence at Section 718.204(c)(4) (2000), and was, therefore, sufficient to establish a change in conditions at 20 C.F.R. §725.310 (2000). Judge Phalen, nonetheless, denied benefits because he found that disability causation was not established, on the merits.

for further consideration of whether the medical opinion evidence established that total respiratory disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). *Short v. Westmoreland Coal Co.*, BRB No. 04-0966 BLA (Sept. 30, 2005) (unpub.).

On remand, the administrative law judge found that no mistake in a determination of fact had been made in the prior denial of benefits. The administrative law judge also found that the newly submitted evidence, considered in conjunction with the previously submitted evidence, failed to support a finding of disability causation. 20 C.F.R. §§718.204(c); 725.310 (2000). Accordingly, the administrative law judge denied the claim for benefits on modification.

On appeal, claimant contends that the administrative law judge erred in failing to find disability causation established as the administrative law judge erred in according less weight to the opinion of Dr. Greenfield, claimant's treating physician. Claimant additionally asserts that certain treatment notes of record establish disability causation, and that the administrative law judge erred in according them little weight. Lastly, claimant asserts that the administrative law judge erred in failing to credit the opinion of the autopsy prosector, Dr. Alley, as support for a finding of disability causation. Employer, in response, 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 rational, supported by substantial evidence, and in accordance with applicable law. 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).

Claimant appealed and employer cross-appealed. Claimant, however, subsequently requested that the Board remand the case for consideration of new evidence. By Order dated November 9, 2000, the Board dismissed claimant's appeal and remanded the case to the district director for modification proceedings. The Board also dismissed employer's cross-appeal. *Short v. Westmoreland Coal Co.*, BRB Nos. 00-0925 BLA and 00-0925 BLA-A (Nov. 9, 2000) (Order). In a Decision and Order dated September 17, 2004 Administrative Law Judge Joseph E. Kane found that while there was no mistake in a determination of fact in Judge Phalen's previous denials, new evidence did establish a change in conditions by establishing disability causation and, therefore, established a basis for modifying the prior denial. Considering the case on the merits, the administrative law judge found that all elements of entitlement were established and awarded benefits. Employer appealed, contending that the administrative law judge erred in finding a change in conditions and disability causation established.

In finding that claimant failed to establish that his total respiratory disability was due to pneumoconiosis, the administrative law judge found that there were no well-reasoned, well-documented opinions of record supporting such a finding at Section 718.204(c).[4] Decision and Order on Remand at 8. The administrative law judge found that the opinions of Drs. Jarboe, Dahhan, Castle and Fino, Director's Exhibit 146; Employer's Exhibits 4, 6, 9, 10, 12, 14, 15, rejecting a diagnosis of disability causation, were well-reasoned, well-documented opinions. Decision and Order on Remand at 8. Thus, the administrative law judge denied benefits.[5]

Claimant asserts that the opinion of claimant's treating physician, Dr. Greenfield, is a thorough and well-supported opinion supporting a finding that his total disability was due to pneumoconiosis. Claimant argues that, as claimant's treating physician, Dr. Greenfield was more familiar with claimant's condition, and thus, his opinion should be accorded superior weight. In considering this opinion, on remand, however, while recognizing that Dr. Greenfield was claimant's treating physician, the administrative law judge found that the opinion of the physician was entitled to little weight as he failed to indicate what objective testing and medical history he relied on in reaching his determination. Decision and Order on Remand at 5. This was reasonable. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003); *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 22 BLR 2-494 (6th Cir. 2002); *Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-89 n.4 (1993)(administrative law judge must consider physician's report to determine if report's underlying documentation supports its conclusion). We, thus, reject claimant's assertion that Dr. Greenfield's opinion was entitled to dispositive weight based on the physician's status as claimant's treating physician.

Claimant also argues that the opinion of Dr. Greenfield regarding disability causation, was supported by the autopsy report of Dr. Alley, who opined that the claimant suffered from pneumoconiosis and chronic obstructive pulmonary disease. Claimant's Exhibit 1. Contrary to claimant's assertion, however, and as the administrative law judge found, the opinion of Dr. Alley did not address whether claimant suffered from a totally

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[4] The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c), is now found at 20 C.F.R. §718.204(b) while the provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b), is now found at 20 C.F.R. §718.204(c).

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as the miner was last employed in the coal mine industry in the Commonwealth of Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 3.

disabling respiratory or pulmonary impairment or whether any such impairment was attributable to his pneumoconiosis. *Id*. Accordingly, the administrative law judge rationally found that Dr. Alley's opinion was not supportive of a finding of disability causation. *See* 20 C.F.R. §718.204(c); *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989); *see also Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997).

Lastly, claimant argues that the July 21, 1997 treatment notes found that claimant was totally disabled due to pneumoconiosis, Director's Exhibit 144, and that the administrative law judge erred in according it little weight. In considering the treatment note in question, the administrative law judge found that no medical basis was provided for the medical conclusion reached therein. Thus, contrary to claimant's assertion, the administrative law judge rationally accorded the treatment note little weight. *Williams*, 338 F.3d at 513, 22 BLR at 2-647; *Stephens*, 298 F.3d at 522, 22 BLR at 2-510; *Collins*, 21 BLR at 1-189. In the absence of any further challenge to the administrative law judge's determination that claimant failed to establish that his total respiratory disability was due to pneumoconiosis, we must affirm the administrative law judge's finding.

Because claimant has failed to establish that his total respiratory disability was due to pneumoconiosis, a requisite element of entitlement pursuant to 20 C.F.R. Part 718, *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*), entitlement is precluded. We thus affirm the administrative law judge's denial of benefits on modification. 20 C.F.R. §725.310 (2000); *see Worrell v. Consolidation Coal Co.*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994).

Accordingly, the administrative law judge's Decision and Order on Remand-Denying Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge