BRB No. 00-0509 BLA

JOE D. SIMPSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NATIONAL MINES CORPORATION	)	DATE ISSUED:
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
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 of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Albert B. McQueen, Jr. (Wilson, Sowards, Polites & McQueen), Lexington, Kentucky, for claimant.

Michael J. Pollack (Arter & Hadden LLP), Washington, D.C., for employer.

Timothy S. Williams (Judith E. Kramer, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative

Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order (98-BLA-1280) of Administrative Law Judge Thomas F. Phalen, Jr. (the administrative law judge) 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).[1] The administrative law judge adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718.[2] The administrative law judge found the newly submitted evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4)(2000). The administrative law judge also found the newly submitted evidence insufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2000). Consequently, the administrative law judge found the evidence insufficient to establish a change in conditions pursuant to 20 C.F.R. §725.310(2000). Further, the administrative law judge found the evidence insufficient to establish a mistake in a determination of fact pursuant to 20 C.F.R. §725.310(2000). Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's finding that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) and (a)(4)(2000). Claimant also challenges the administrative law judge's

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[1]The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2]Claimant filed a claim for benefits on September 8, 1987. Director's Exhibit 1. On March 21, 1991, Administrative Law Judge Daniel J. Roketenetz issued a Decision and Order awarding benefits, Director's Exhibit 73, which the Board affirmed in part and vacated in part, and remanded for further consideration, *Simpson v. National Mines Corp.*, BRB Nos. 91-1137 BLA and 91-1137 BLA-A (Apr. 26, 1993)(unpub.). Judge Roketenetz subsequently issued a Decision and Order on Remand denying benefits on October 14, 1994, Director's Exhibit 105, which the Board affirmed, *Simpson v. National Mines Corp.*, BRB No. 95-0555 BLA (July 31, 1995)(unpub.). Following an appeal by claimant, the United States Court of Appeals for the Sixth Circuit affirmed Judge Roketenetz's denial of benefits. *Simpson v. National Mines Corp.*, No. 95-4061 (6th Cir. Feb. 25, 1997)(unpub.). The bases of Judge Roketenetz's denial of benefits were claimant's failure to establish the existence of pneumoconiosis and total disability due to pneumoconiosis. Director's Exhibit 105. Claimant filed a request for modification on January 15, 1998. Director's Exhibit 118.

finding that the newly submitted evidence is insufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(b)(2000). Lastly, claimant challenges the administrative law judge's finding that the evidence is insufficient to establish a change in conditions and a mistake in a determination of fact at 20 C.F.R. §725.310(2000). Employer responds, urging affirmance of the administrative law judge's Decision and Order.[3] The Director, Office of Workers' Compensation Programs (the Director), contends that both claimant and employer are incorrect in their belief that the legal standard adopted by the United States Court of Appeals for the Sixth Circuit in *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994),[4] applies to the issue of a change in conditions at 20 C.F.R. §725.310(2000).[5]

[3]Claimant filed a brief in reply to employer's response brief, reiterating his prior contention with regard to the issue of a change in conditions at 20 C.F.R. §725.310(2000).

[4]Inasmuch as claimant's most recent coal mine work was performed in Kentucky, the Board will apply the law of the Sixth Circuit in this case. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[5]Inasmuch as the findings of Administrative Law Judge Thomas F. Phalen, Jr. (the administrative law judge) pursuant to 20 C.F.R. §718.202(a)(2) and (a)(3) are not challenged on appeal, we affirm these findings. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on February 21, 2001, to which claimant, employer and the Director have responded.[6] Based on the briefs submitted by the parties, and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, the Board will proceed to adjudicate the merits of this appeal.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the

[6]In a brief dated March 14, 2001, employer asserted that the regulations at issue in the lawsuit do not affect the outcome of the case. Employer also stated that if the Board believes that the new regulations somehow affect the disposition of this appeal, the case must be stayed for the duration of the briefing, hearing and decision schedule in accordance with the preliminary injunction of the United States District Court for the District of Columbia. In a brief dated March 9, 2001, the Director, Office of Worker's Compensation Programs, asserted that the regulations at issue in the lawsuit do not affect the outcome of the case. However, in a brief dated March 13, 2001, claimant asserted that the amended regulations would affect the outcome of the case. The amendments to the regulations cited by claimant at 20 C.F.R. §§718.104(d), 725.310 and 725.414 apply only to claims filed after January 19, 2001. Consequently, those regulations do not apply to the instant claim.

Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Initially, we will address claimant's contention that the administrative law judge applied an incorrect legal standard in finding the evidence insufficient to establish a change in conditions at 20 C.F.R. §725.310(2000). Claimant specifically asserts that the administrative law judge should have applied the legal standard adopted by the Sixth Circuit in *Ross*. In the prior decision, Administrative Law Judge Daniel J. Roketenetz denied benefits because claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2000) and total disability due to pneumoconiosis at 20 C.F.R. §718.204(b)(2000), findings subsequently affirmed by the Board and the Sixth Circuit.[7] Director's Exhibit 105. The Board has held that in considering whether a claimant has established a change in conditions at 20 C.F.R. §725.310(2000), an administrative law judge is obligated to perform an independent assessment of the newly submitted evidence, considered 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 which defeated entitlement in the prior decision. *See Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-8 (1994); *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). Here, the administrative law judge stated, "[i]n accordance with the above precedent, I will review the newly submitted evidence, in conjunction with prior evidence, to determine whether such evidence establishes that claimant suffers from pneumoconiosis and that his totally disabling respiratory condition is due to pneumoconiosis." Decision and Order at 5.

In *Ross*, the Sixth Circuit held that in assessing whether a material change in conditions has been established, an administrative law judge must consider all of the new evidence, favorable and unfavorable, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him. As the Director argues, the standard adopted in *Ross* applies to duplicate claims under 20 C.F.R. §725.309(2000), and does not apply to requests for modification under 20 C.F.R. §725.310(2000). The instant case does not involve a duplicate claim. To the contrary, this case involves a request for modification under 20 C.F.R. §725.310(2000). Thus, we reject claimant's contention that the administrative law judge applied an incorrect legal standard in finding the evidence insufficient to establish a change in conditions at 20 C.F.R. §725.310(2000) since he did not apply the legal standard adopted by the Sixth Circuit in

[7]The administrative law judge observed that "[i]n the most recent decision, the administrative law judge found, and the Board and the Sixth Circuit affirmed, that the claimant failed to establish the existence of pneumoconiosis, established total disability, but did not prove that his total disability was due to pneumoconiosis." Decision and Order at 5.

Ross. Moreover, in view of the foregoing, we reject claimant's assertion that, in light of *Ross*, the administrative law judge should disregard the opinions of Drs. Branscomb and Fino because their opinions are predicated upon a review of all of the evidence of record, both new and old.

Next, claimant contends that the administrative law judge erred in finding the newly submitted evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)(2000). Of the sixteen newly submitted x-ray interpretations of record, thirteen readings are negative for pneumoconiosis, Director's Exhibits 120, 122, 128; Employer's Exhibits 1-3, and three readings are positive, Director's Exhibit 118; Claimant's Exhibits 1, 2, 4, 5. In addition to noting the numerical superiority of the negative x-ray readings, the administrative law judge also considered the qualifications of the various physicians.[8] *See Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Sahara Coal Co. v. Fitts*, 39 F.3d 781, 18 BLR 2-384 (7th Cir. 1994). Thus, we reject claimant's assertion that the administrative law judge erred in assigning undue weight to the numerical superiority of the negative x-ray readings provided by employer. We also reject claimant's assertion that the administrative law judge erred in failing to undertake any evaluation of the role of the party affiliation of the experts. The identity of a party who hires a medical expert does not, by itself, demonstrate partiality or partisanship on the part of the physician. *See Urgolites v. Bethenergy Mines, Inc.*, 17 BLR 1-20 (1992); *see also Stanford v. Valley Camp Coal Co.*, 7 BLR 1-906 (1985); *Chancey v. Consolidation Coal Co.*, 7 BLR 1-240 (1984). Inasmuch as it is supported by substantial evidence, we affirm the administrative law judge's finding that the newly submitted x-ray evidence is insufficient to establish the existence of pneumoconiosis. 20 C.F.R. §718.202(a)(1).

[8]The administrative law judge stated, "I find the readings of no pneumoconiosis by twelve "B" readers and/or Board certified physicians substantially outweigh the three readings, by two dually certified readers and one "B" reader, consistent with pneumoconiosis." Decision and Order at 10.

Further, claimant contends that the administrative law judge erred in finding the newly submitted evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4)(2000). Specifically, claimant asserts that the administrative law judge erred in discrediting Dr. Wright's opinion since Dr. Wright is his treating physician. Whereas Drs. Baker and Wright opined that claimant suffers from pneumoconiosis, Director's Exhibit 118; Claimant's Exhibits 1, 2, Drs. Branscomb, Broudy and Fino[9] opined that claimant does not suffer from pneumoconiosis, Director's Exhibit 28; Employer's Exhibits 4-8. The administrative law judge stated, "upon consideration of all the newly submitted medical opinion evidence, I find that the opinions of Drs. Broudy and Branscomb outweigh those of Drs. Baker and Wright."[10] Decision and Order at 11. Although the Sixth Circuit has held that the opinions of treating physicians are entitled to greater weight than those of nontreating physicians, *see Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993), the Sixth Circuit has also indicated that this principle does not alter the administrative law judge's duty, as trier of fact, to evaluate the credibility of the treating physician's opinion, *see Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995). In the instant case, the administrative law judge properly accorded greater weight to the opinions of Drs. Branscomb and Broudy than to the contrary opinion of Dr. Wright, because he found their opinions to be better reasoned and documented.[11] *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149

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[9]The administrative law judge discredited Dr. Fino's opinion because he found that "there is insufficient evidence in the record in this case for Dr. Fino to find that, 'the man would be as disabled as I find him now had he never stepped foot in the mines.'" Decision and Order at 9 n.9. The administrative law judge stated, "I have stated in other decisions and orders that I consider such a gratuitous statement by Dr. Fino to be evidence of a biased medical opinion, directly affecting the credit and weight that should be given to it." *Id*. Inasmuch as the opinion of Dr. Fino supports the administrative law judge's findings that the evidence is insufficient to establish the existence of pneumoconiosis and total disability due to pneumoconiosis, we hold that any error by the administrative law judge in this regard is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[10]The administrative law judge stated that Dr. Baker's "determination is belied by the x-ray evidence." Decision and Order at 11. The administrative law judge observed that Dr. Baker's "positive reading was reread as negative by five better qualified interpreters." *Id*. Although the administrative law judge found that "this alone is an insufficient basis for discounting Dr. Baker's opinion," *id*., we note that this is a valid basis for discounting a medical opinion, *see Winters v. Director, OWCP*, 6 BLR 1-877, 881 n.4 (1984).

[11]The administrative law judge observed that the "conclusions [of Drs. Branscomb and Broudy] are supported by the x-ray evidence." Decision and Order at 11. Further, the administrative law judge stated, "I also place more weight on [Dr. Broudy's] opinion because

(1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). In addition, the administrative law judge properly accorded greater weight to the opinions of Drs. Branscomb and Broudy than to the contrary opinion of Dr. Wright, because of their superior qualifications.[12] *See Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Thus, we reject claimant's assertion that the administrative law judge erred in discrediting Dr. Wright's opinion since Dr. Wright is his treating physician.[13] Inasmuch as it is supported by substantial evidence, we affirm the

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he had the opportunity to examine the claimant in 1988 and thus had ten years over which to evaluate any changes in the miner's physical condition." *Id*. Similarly, the administrative law judge stated that "Dr. Branscomb had reviewed the medical evidence submitted in conjunction with the original claim in July 1989, thus providing him with nearly a decade of additional medical evidence against which to compare his original conclusions." *Id*. In contrast, the administrative law judge observed that "Dr. Wright's opinion...is based on one x-ray which was not interpreted as showing pneumoconiosis." *Id*. The administrative law judge therefore stated that Dr. Wright's "opinion is belied by the only objective evidence he considered, according to the record." *Id*. The administrative law judge also stated that "[a]lthough he has treated the miner since February 1998, there is no indication that Dr. Wright was aware of [claimant's] occupational or smoking histories." *Id*. Furthermore, the administrative law judge observed that "Dr. Wright's progress notes do not show any diagnosis of pneumoconiosis, thus casting suspicion on his diagnosis of the disease only when asked by claimant's counsel." *Id*.

[12]Dr. Branscomb is Board-certified in internal medicine. Employer's Exhibit 5. Dr. Broudy is Board-certified in internal medicine and pulmonary disease. Employer's Exhibit 4. The record does not contain the credentials of Dr. Wright.

[13]We reject claimant's assertion that the administrative law judge erred in finding that there is no indication that Dr. Wright was aware either of claimant's occupational history or smoking history. Although the medical report and progress notes of Dr. Wright referred generally to smoking and coal dust exposure, the record does not indicate that Dr. Wright was aware of the extent of claimant's smoking and coal dust exposure histories. Dr. Wright's opinion is contained on a February 8, 1999 letter written by claimant's counsel, which asks specific questions about claimant's condition. In his letter, claimant's counsel referred to an occupational history of nineteen years of dust exposure in his second question. Dr. Wright, however, did not provide an independent coal mine employment history. Rather, Dr. Wright merely opined, in response to claimant's counsel's third question, that claimant's "pulmonary disability is in part due to his exposure to coal dust during his mining employment." Claimant's Exhibit 1. Moreover, the progress notes and medical forms relating to Dr.

administrative law judge's finding that the newly submitted medical opinion evidence is insufficient to establish the existence of pneumoconiosis. 20 C.F.R. §718.202(a)(4).

Wright's treatment of claimant only indicate that claimant smoked, and do not indicate the extent of claimant's smoking history.

In addition, claimant contends that the administrative law judge erred in finding the newly submitted evidence insufficient to establish total disability due to pneumoconiosis. As an initial matter, we note that 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) while 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). Whereas Drs. Baker and Wright opined that claimant suffers from a disabling respiratory or pulmonary impairment due to pneumoconiosis, Director's Exhibit 118; Claimant's Exhibits 1, 2, Drs. Branscomb, Broudy and Fino opined that claimant does not suffer from a disabling respiratory or pulmonary impairment due to pneumoconiosis, Director's Exhibit 128; Employer's Exhibits 4-8. The administrative law judge properly accorded greater weight to the opinions of Drs. Branscomb and Broudy than to the contrary opinions of Drs. Baker and Wright because he found the former opinions to be better reasoned and documented.[14] *See Clark, supra*; *Fields, supra*; *Lucostic, supra*; *Fuller, supra*. Thus, we reject claimant's assertion that the administrative law judge erred in discrediting Dr. Wright's opinion. Inasmuch as it is supported by substantial evidence, we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish total disability due to pneumoconiosis. 20 C.F.R. §718.204(c). Moreover, since the administrative law judge properly found the newly submitted evidence insufficient to establish the existence of pneumoconiosis and total disability due to pneumoconiosis, we affirm the administrative law judge's finding that the evidence is insufficient to establish a change in conditions at 20 C.F.R. §725.310(2000). *See Kingery, supra*; *Nataloni, supra*; *Kovac, supra*.

Finally, claimant contends that the administrative law judge erred in failing to consider and weigh the evidence with respect to his finding of no mistake in a determination of fact at 20 C.F.R. §725.310(2000). Contrary to claimant's contention, the administrative law judge found no mistake in a determination of fact after "reviewing the entire record." Decision and Order at 12; *see Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994). Moreover, we hold that substantial evidence supports the

[14]The administrative law judge stated that "[t]he opinions of Drs. Broudy and Branscomb are well documented and reasoned." Decision and Order at 12. The administrative law judge observed that "[t]hey each noted that while [claimant] had not worked in the coal mining industry since 1985, his heavy smoking continued for some time, and his respiratory capacity declined." *Id*. The administrative law judge therefore stated that "[t]hese factors evince the logical nature of their conclusions while simultaneously exhibiting the flaw in Dr. Baker's opinion." *Id*. The administrative law judge further stated, "I place less weight on Dr. Wright's opinion because it is unclear what he relied on in reaching it." *Id*. The administrative law judge observed that "[t]here is no mention of a smoking or coal mine employment history in his notes and responses." *Id*.

administrative law judge's finding that the evidence is insufficient to establish a mistake in a determination of fact at 20 C.F.R. §725.310(2000).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge