BRB No. 00-0619 BLA

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| ALFIERO BERARDI | ) | |
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| Claimant-Petitioner | ) | |
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| v. | ) | |
| | ) | DATE ISSUED: |
| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| | ) | |
| Respondent | ) | DECISION and ORDER |

Appeal of the Decision and Order On Remand of Ainsworth H. Brown, Administrative Law Judge, United States Department of Labor.

Maureen Hogan Krueger, Jenkintown, Pennsylvania, for claimant.

Jeffrey S. Goldberg (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: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order On Remand (97-BLA-1346) of Administrative Law Judge Ainsworth H. Brown 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] This case is before the Board for the fifth time.

[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.

Subsequent to the decision of the United States Court of Appeals for the Third Circuit, summarily affirming denial of his claim,[2] claimant filed a timely petition for modification on

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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 Association 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 the Director, Office of Workers' Compensation Programs, has responded, contending that the regulations at issue in the lawsuit will not affect the outcome of the case. Inasmuch as claimant has not timely submitted a brief in response to the Board's order, we construe claimant's position as being that the challenged regulations will not affect the outcome of the case.

This case involves a motion for modification filed pursuant to 20 C.F.R. §725.310 (2000), but not pursuant to the revised, and challenged, regulation at 20 C.F.R. §725.310, which is only applicable to claims filed after January, 19, 2000, *see* 20 C.F.R. §725.2(c). In addition, at issue in this case is the weighing of x-ray evidence pursuant to 20 C.F.R. §410.490(b), which was not revised by the new regulations. Finally, the Board previously affirmed the administrative law judge's finding that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a) on modification. Section 718.202(a) was only revised in regard to the consideration of biopsy evidence, which is not contained in the record in this case, *see* 20 C.F.R. §718.202(a)(2), and Section 718.202(a) is not one of the regulations at issue in the lawsuit. Consequently, based on the responses by the parties, and our review, we hold that the disposition of this case is not impacted by the challenged regulations.

[2] Claimant originally filed a claim with the Social Security Administration on March 20, 1970, Director's Exhibits 1-2, which was ultimately referred to the Department of Labor for review. In a Decision and Order issued on April 11, 1985, Administrative Law Judge Aaron Silverman found nine and one-half years of coal mine employment established, adjudicated the claim pursuant to the permanent criteria at 20 C.F.R. Part 410, Subpart D, and found that claimant failed to establish entitlement to benefits, Director's Exhibit 38. Claimant appealed and the Board initially affirmed Judge Silverman's finding of nine and one-half years of coal mine employment, but remanded the case for consideration of the evidence pursuant to 20 C.F.R. Part 718, in accordance with the holding of the United States

January 10, 1997, Director's Exhibit 77. In a Decision and Order issued on July 14, 1998, the administrative law judge found no mistake in a determination of fact was established pursuant to 20 C.F.R. §725.310 (2000) and further found that the newly submitted x-ray evidence was insufficient to establish the existence of pneumoconiosis or, therefore, invocation of the interim presumption pursuant to 20 C.F.R. §410.490(b)(1) as applied to short-term miners. Finally, the administrative law judge found the newly submitted evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) in accordance with the holding of the United States Court of Appeals for the Third Circuit in *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 25, 21 BLR 2-104, 2-111 (3d Cir. 1997)("all types of relevant evidence must be weighed together" in determining whether claimant has met his burden of establishing the existence of pneumoconiosis pursuant to Section 718.202). Consequently, the administrative law judge found that claimant failed to establish a basis for modification pursuant to Section 725.310 (2000).

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Court of Appeals for the Third Circuit, within whose jurisdiction this case arises, in *Caprini v. Director, OWCP*, 824 F.2d 283, 10 BLR 2-180 (3d Cir. 1987), Director's Exhibit 42. *Berardi v. Director, OWCP*, BRB No. 85-1230 BLA (Oct. 31, 1988)(unpub.).

In a Decision and Order On Remand issued on October 10, 1989, Judge Silverman found that claimant failed to establish entitlement pursuant to Part 718, Director's Exhibit 43. Claimant appealed and the Board affirmed Judge Silverman's finding that entitlement pursuant to Part 718 was precluded based on claimant's failure to establish total disability pursuant to 20 C.F.R. §718.204(c) (2000), but nevertheless vacated the denial of benefits and remanded the case for the Department of Labor to provide claimant with a complete, credible pulmonary evaluation, Director's Exhibit 54. *Berardi v. Director, OWCP*, BRB No. 89-3639 BLA (Dec. 3, 1991)(unpub.).

In a Decision and Order issued on June 21, 1993, Administrative Law Judge Ainsworth H. Brown (hereinafter, the administrative law judge) found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) and denied benefits, Director's Exhibit 74. Claimant appealed and the Board affirmed the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(4) and, therefore, held that the evidence of record was also insufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §410.490(b)(1) as applied to short-term miners under *Phipps v. Director, OWCP*, 17 BLR 1-39 (1992)(*en banc*)(Smith, J., concurring; McGranery, J., concurring and dissenting), Director's Exhibit 75. *Berardi v. Director, OWCP*, BRB No. 93-2083 BLA (Apr. 26, 1995)(unpub.). Claimant appealed, but the Third Circuit issued a summary order denying claimant's petition for review, Director's Exhibit 76. *Berardi v. Director, OWCP*, No. 95-3332 (3d Cir., Jan. 22, 1996)(unpub. order.).

Accordingly, benefits were denied.

Claimant appealed and the Board initially affirmed the administrative law judge's finding that the existence of pneumoconiosis was not established pursuant to Section 718.202(a) as unchallenged, but vacated the administrative law judge's finding that the newly submitted x-ray evidence was insufficient to establish the existence of pneumoconiosis and, therefore, invocation of the interim presumption pursuant to Section 410.490(b)(1)(i) as applied to short-term miners and remanded the case for reconsideration. *Berardi v. Director, OWCP*, BRB No. 98-1498 BLA (Oct. 28, 1999)(unpub.). The Board also instructed the administrative law judge to address whether the x-ray rereading prohibition set forth at Section 413(b) of the Act, 30 U.S.C. §923(b); *see also* 20 C.F.R. §727.206(b)(1), is applicable under the facts of this case (*i.e.*, whether the record contains evidence, which, if credited, demonstrates a significant and measurable pulmonary or respiratory impairment).[3] In addition, inasmuch as the administrative law judge had credited later negative x-ray readings over earlier positive x-ray readings on the basis of the recency of the negative x-ray readings, the Board instructed the administrative law judge on remand to consider the concerns and criticism of such an application of the later evidence rule when weighing the x-ray evidence as raised in *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993) and *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992).

[3] In all claims filed before January 1, 1982, Section 413(b) of the Act, 30 U.S.C. §923(b), prohibits the Director, Office of Workers' Compensation Programs, from having certain x-rays reread except for purposes of determining quality, *see Tobias v. Republic Steel Corp.*, 2 BLR 1-1277 (1981). This prohibition is applicable when each of the following threshold requirements has been met: 1) the physician who originally read the x-ray is either board certified or board eligible; 2) there is other evidence of a significant and measurable pulmonary or respiratory impairment; 3) the x-ray was performed in compliance with the requirements of the applicable quality standards and was taken by a radiologist or qualified radiologic technician; and 4) there is no evidence that the claim was fraudulently represented, *see* 0 C.F.R. §727.206(b)(1); *Auxier v. Director, OWCP*, 4 BLR 1-717 (1982).

On remand, at issue herein, the administrative law judge again found that the newly submitted x-ray evidence was insufficient to establish the existence of pneumoconiosis or, therefore, invocation of the interim presumption pursuant to Section 410.490(b)(1)(i) as applied to short-term miners. Consequently, the administrative law judge found that claimant failed to establish a basis for modification pursuant to Section 725.310 (2000). Accordingly, benefits were denied. On appeal, claimant contends that the administrative law judge erred in his weighing of the relevant x-ray evidence pursuant to Section 410.490(b)(1)(i) and contends that the administrative law judge unfairly denied benefits based, in part, on an x-ray that claimant had no opportunity to have reread. The Director, Office of Workers' Compensation Programs (the Director), responds, also contending that the administrative law judge erred in his weighing of the relevant x-ray evidence pursuant to Section 410.490(b)(1)(i) and, therefore, urging the Board to remand the case for reconsideration.

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

Pursuant to Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §922, as incorporated into the Act by 30 U.S.C. §932(a) and as implemented by 20 C.F.R. §725.310 (2000), *see* 20 C.F.R. §725.2(c), a party may request modification of a denial on the grounds of a change in conditions or because of a mistake in a determination of fact. In considering whether a claimant has established a change in conditions, an administrative law judge must consider all of the newly submitted evidence, in conjunction with the previously submitted evidence, to determine if the new evidence is sufficient to establish at least one of the elements of entitlement which defeated entitlement in the prior decision, *see Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993). However, if a claimant merely alleges that the ultimate fact was wrongly decided, the administrative law judge may, if he chooses, accept this contention and modify the final order accordingly (*i.e.*, "there is no need for a smoking gun factual error, changed conditions or startling new evidence"), *see Keating v. Director, OWCP*, 71 F.3d 1118, 20 BLR 2-53 (3d Cir. 1995), *quoting Jessee v. Director, OWCP*, 5 F.3d 723, 725, 18 BLR 2-26-28 (4th Cir. 1993).

In light of the decision of the United States Supreme Court in *Pittston Coal Group v. Sebben*, 109 S. Ct. 414, 12 BLR 2-89 (1988), in cases involving miners with less than ten years of coal mine employment which were filed on or before March 31,1980, claimants are entitled to an interim presumption of total disability due to pneumoconiosis where claimants can establish, pursuant to Section 410.490(b)(1)(i), the existence of pneumoconiosis by x-ray, autopsy or biopsy, and that this pneumoconiosis, arose out of coal mine employment, *see*

*Phipps v. Director, OWCP*, 17 BLR 1-39 (1992)(*en banc*)(Smith, J., concurring; McGranery, J., concurring and dissenting).

Initially, the administrative law judge considered whether the x-ray rereading prohibition set forth at Section 413(b) of the Act, 30 U.S.C. §923(b); *see also* 20 C.F.R. §727.206(b)(1), was applicable. The newly submitted x-ray evidence included x-rays dated April 29, 1996, and October 3, 1996, which were originally read as positive by board-certified radiologists, *see* Director's Exhibit 80; Claimant's Exhibit 1, and which were subsequently reread by physicians on behalf of the Director as negative, *see* Director's Exhibits 84, 96-98. Although the administrative law judge found "little credible evidence of a significant respiratory or pulmonary impairment," the administrative law judge stated that, "[n]evertheless," he would "assume, *arguendo*, that the less credible evidence of a pulmonary or respiratory impairment would be sufficient to exclude" the rereadings and, therefore, the administrative law judge excluded the negative rereadings of the x-rays dated April 29, 1996, and October 3, 1996. Decision and Order On Remand at 5. Although claimant notes that it is difficult to determine whether the administrative law judge made a finding regarding the Section 413(b) x-ray rereading prohibition, the Director concedes on appeal that the pulmonary function study evidence of record establishes a respiratory impairment sufficient to invoke the Section 413(b) x-ray rereading prohibition and, therefore, concedes that the x-rays dated April 29, 1996, and October 3, 1996, must be considered as positive readings for pneumoconiosis. Thus, the administrative law judge's exclusion of the negative rereadings of the x-rays dated April 29, 1996, and October 3, 1996, pursuant to Section 413(b) of the Act, 30 U.S.C. §923(b); *see also* 20 C.F.R. §727.206(b)(1), is affirmed as unchallenged by any party on appeal, *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Consequently, the administrative law judge considered the relevant, newly submitted x-ray evidence of record, which consists of the April, 1996, x-ray read as positive by Drs. Bassali, Claimant's Exhibit 2, and Smith, Claimant's Exhibit 3, both of whom are board-certified radiologists and B-readers, as well as by Dr. Parrilo, a B-reader, Claimant's Exhibit 1, and the October, 1996, x-ray also read as positive by Drs. Bassali, Director's Exhibit 83, and Smith, Director's Exhibit 80. Finally, a November, 1997, x-ray was read as negative by Drs. Cole, Director's Exhibit 99, Navani, Director's Exhibit 100, and Sargent, Director's Exhibit 101, all of whom are board-certified radiologists and B-readers, as well as by Dr. Levinson, Director's Exhibit 90. In addition, the administrative law judge noted that Dr. Gaziano provided an inconclusive reading of the November, 1997, x-ray, Director's Exhibit 93.

The administrative law judge gave most weight to the readings by those physicians who were both board-certified radiologists and B-readers due to their superior credentials and, therefore, found that while the majority of the x-ray readings by physicians who were both board-certified radiologists and B-readers were positive (*i.e.*, four positive x-ray

readings, as opposed to three negative x-ray readings), the majority of the physicians who were both board-certified radiologists and B-readers who read the x-rays provided negative readings (*i.e.*, three physicians provided negative readings, while two physicians provided positive readings). Decision and Order On Remand at 6. Moreover, in view of the progressive and irreversible nature of pneumoconiosis, the administrative law judge gave greater weight to the most recent x-ray of record, which was read as negative. While noting that he was cognizant of the criticism expressed by the Sixth Circuit in *Woodward* and the Fourth Circuit in *Adkins* regarding the application of the later evidence rule in order to credit the most recent x-ray evidence when it was negative, the administrative law judge noted the Third Circuit had not adopted their approach. Finally, the administrative law judge found that, even if he did not give greater weight, on the basis of its recency, to the most recent x-ray of record which was read as negative, the conflicting x-ray readings by similarly credentialed physicians, who were both board-certified radiologists and B-readers, at best, neither precluded nor established the existence of pneumoconiosis. Thus, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis by a preponderance of the x-ray evidence in accordance with the holding of the United States Supreme Court in *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993).

Claimant and the Director contend that the administrative law judge erred in giving greater weight to the most recent x-ray of record, which was read as negative, in view of the progressive and irreversible nature of pneumoconiosis. Claimant also contends that the administrative law judge did not address or consider the fact that the majority of the newly submitted x-rays (*i.e.*, two of the three) had been read as positive for pneumoconiosis.

However, the administrative law judge ultimately concluded that the conflicting x-ray readings by similarly credentialed physicians, who were both board-certified radiologists and B-readers, at best, neither precluded nor established the existence of pneumoconiosis. In *Ondecko*, the Supreme Court held that the reference to the "burden of proof" in §7(c) of the Administrative Procedure Act, 5 U.S.C. §556(d), refers to the burden of persuasion, and therefore held that when the evidence is evenly balanced, the claimant must lose pursuant to Section 7(c), *see Ondecko, supra*. Thus, inasmuch as the administrative law judge's finding that claimant failed to carry his burden in order to establish the existence of pneumoconiosis pursuant to Section 410.490(b)(1)(i) by a preponderance of the x-ray evidence in accordance with the standard enunciated in *Ondecko* is supported by substantial evidence, it is affirmed. Consequently, any error by the administrative law judge in his weighing of the x-ray evidence and/or giving greater weight to the most recent x-ray, which was read as negative, based on its recency, *see Kowalchick v. Director, OWCP*, 893 F.2d 615, 621, 13 BLR 2-226, 2-236-237 (3d Cir. 1990); *see also Woodward*, *supra*; *Adkins*, *supra*, was harmless, *see*

*Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).[4]

Claimant also contends, however, that it was unfair for the administrative law judge to deny benefits based, in part, on the most recent November, 1997, x-ray, which was read only as negative by physicians on behalf of the Director, because claimant contends he had no opportunity to have the x-ray reread on remand. Claimant contends that the administrative law judge's Decision and Order On Remand demonstrates the administrative law judge's hostility to claimant and that the administrative law judge has lost all semblance of impartiality. Thus, claimant urges the Board to remand the case to a new administrative law judge to take a fresh look at the evidence and/or, at his discretion, to reopen the record.

Claimant notes that, in the Director's brief to the Board filed in conjunction with claimant's previous appeal, the Director stated that the Director had no objection if claimant had the November, 1997, x-ray reread on remand. After issuance of the Board's prior Decision and Order on October 28, 1999, remanding the case for reconsideration, claimant's counsel asserts that she waited to receive an official Notice from the Board that the record had been forwarded to the administrative law judge on remand prior to making a request with the administrative law judge to have the November, 1997, x-ray reread. Claimant notes, however, that the administrative law judge issued his Decision and Order On Remand denying benefits on February 14, 2000, without ever inviting the parties to brief their positions on remand and before the Board issued its official Notice on February 23, 2000, informing the parties that the record had been forwarded by the Board to the administrative

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[4] The Director also contends that the administrative law judge should have considered all of the x-ray evidence of record to determine if a mistake in a determination of fact had occurred pursuant to Section 725.310 (2000), in accordance with the holding in *Keating*. *See Keating*, 71 F.3d at 1123, 20 BLR at 2-63 (the administrative law judge must review all evidence of record, both the newly submitted evidence and the evidence previously in the record and determine whether there was any mistake of fact made in the prior adjudication, including the ultimate fact). Contrary to the Director's contention, in his original July, 1998, Decision and Order on modification, the administrative law judge considered the entire record and found that no mistake in a determination in fact was established, *see* 1998 Decision and Order at 4. The administrative law judge incorporated his finding into his Decision and Order On Remand and further found that the x-ray evidence submitted prior to claimant's request for modification was insufficient to establish the existence of pneumoconiosis, *see* Decision and Order On Remand at 4. Inasmuch as the administrative law judge's finding that no mistake in a determination in fact was established pursuant to Section 725.310 (2000) is not challenged by any party, it is affirmed, *see Skrack, supra*. Moreover, the administrative law judge properly considered whether the newly submitted x-ray evidence is sufficient to establish the existence of pneumoconiosis pursuant to Section 401.490(b)(1)(i), the element of entitlement which defeated entitlement in the prior decision, *see Nataloni, supra*.

law judge on remand on December 28, 1999.

However, as the Director contends in response, claimant had notice of the Board's Decision and Order issued on October 28, 1999, remanding the case for reconsideration, *see* 20 C.F.R. §802.403, yet claimant did not contact the administrative law judge and/or have the November, 1997, x-ray reread on remand. Moreover, charges of bias or prejudice by the administrative law judge are not to be made lightly and must be supported by concrete evidence, *see Cochran v. Consolidation Coal Co.*, 16 BLR 1-101, 1-107 (1992); *see also Marcus v. Director, OWCP*, 548 F.2d 1044, 1050 (D.C. Cir. 1976); *Zamora v. C. F. & I. Steel Corp.*, 7 BLR 1-568 (1984). Inasmuch as claimant has failed to present any specific evidence of bias by the administrative law judge, we reject claimant's contentions and his request to remand the case to a new administrative law judge, *see Cochran*, *supra*; *Marcus*, *supra*; *Zamora*, *supra*. Consequently, the administrative law judge's findings that claimant failed to establish invocation of the interim presumption pursuant to Section 410.490(b) and, therefore, a basis for modification pursuant to Section 725.310 (2000), are affirmed.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge