BRB No. 01-0792 BLA

CLINARD BENTLEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED:
	)	
KENTUCKY CARBON CORPORATION	)	
	)	
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 - Denying Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts, Pikeville, 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 appeals the Decision and Order (2000-BLA-667) of Administrative Law Judge Joseph E. Kane denying modification and 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 has been before

[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 20 C.F.R. Parts 718, 722, 725 and 726 (2001).

the Board previously and involves a duplicate claim filed on October 31, 1994.[2] The

[2] Claimant filed his initial claim for black lung benefits on July 11, 1985, which was finally denied on September 28, 1988. Director's Exhibit 30. Claimant filed his second claim for benefits on October 31, 1994. Director's Exhibit 1. In a Decision and Order issued on August 19, 1998, Administrative Law Judge Paul H. Teitler denied benefits upon concluding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) (2000) and, thus, failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). Director's Exhibit 44. Claimant appealed the denial of benefits to the Board and in *Bentley v. Kentucky Carbon Corp.*, BRB No. 97-0376 BLA (Nov. 20, 1997) (unpub.), the Board affirmed the denial of benefits. Director's Exhibit 49. Claimant filed the instant request for modification on October 1, 1998. Director's Exhibits 52-53.

administrative law judge found that the evidence established at least twenty-two years of coal mine employment, and adjudicated the claim pursuant to 20 C.F.R. Part 718. The administrative law judge found that the newly submitted medical evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) (2000). The administrative law judge therefore concluded that the evidence of record was insufficient to establish either a change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000). Accordingly, benefits were denied. On appeal, claimant challenges the administrative law judge's findings under Section 718.202(a)(4) (2000).[3] Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has indicated that he will not participate in this appeal unless requested to do so by the Board.[4]

[3] Claimant also contends that the new evidence submitted in support of modification established total disability due to pneumoconiosis at 20 C.F.R. §718.204 (2000). The administrative law judge, however, determined that total respiratory disability was established in claimant's original claim, thus claimant could not establish a change in conditions based on new evidence of continuing disability. Decision and Order at 4, 22.

[4] Claimant also filed a Motion to Remand with the Board, which was received by the Board on January 29, 2002, alleging that the administrative law judge erred in failing to consider Dr. Mettu's December 4, 1994, medical report. Employer subsequently filed a response to claimant's motion wherein it opposes the motion on the grounds that the motion is untimely and without merit. We agree. Claimant's reply brief was due on October 11, 2001, as the briefing period closed on that date.

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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates*, 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. *See* 20 C.F.R. §§718.3, 718.201, 718.202, 718.203, 718.204. Failure to establish any of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

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20 C.F.R. §802.213(a). In addition, Dr. Mettu's report was previously considered by Judge Teitler and was not part of the newly submitted evidence. We, therefore, deny claimant's Motion to Remand and herein decide the case on the merits.

Claimant may establish modification by establishing either a change in conditions since the issuance of a previous decision or a mistake in a determination of fact in the previous decision. 20 C.F.R. §725.310(a) (2000). In considering whether a change in conditions has been established pursuant to Section 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 1-6, 1-11 (1994); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction the instant case arises,[5] has held that a claimant need not allege a specific error in order for an administrative law judge to find modification based upon a mistake in fact inasmuch as the administrative law judge has broad discretion to correct mistakes of fact, including the ultimate fact of entitlement to benefits, contained within a case. *See Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-291 (6th Cir. 1994).

Claimant makes a general contention that he has established entitlement to benefits but cites no specific error made by the administrative law judge in weighing the medical evidence of record. Claimant's Brief at 1-2. The Board is not authorized to undertake a *de novo* adjudication of the claim. To do so would upset the carefully allocated division of authority between the administrative law judge as the trier-of-fact, and the Board as a reviewing tribunal. *See* 20 C.F.R. §802.301(a); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987). As we have emphasized previously, the Board's circumscribed scope of review requires that a party challenging the Decision and Order below address that Decision and Order with specificity and demonstrate that substantial evidence does not support the result reached or that the Decision and Order is contrary to law. *See* 20 C.F.R. §802.211(b); *Cox v. Director, OWCP*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986), *aff'g* 7 BLR 1-610 (1984); *Slinker v. Peabody Coal Co.*, 6 BLR 1-465 (1983); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983); *Sarf*, *supra*. Unless the party identifies errors and briefs its allegations in terms of the relevant law and evidence, the Board has no basis upon which to review

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as claimant's last coal mine employment occurred in the Commonwealth of Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 2.

the decision. *See Sarf*, *supra*; *Fish*, *supra*.

In the instant case, other than asserting that the administrative law judge "failed to give proper weight to the medical reports of Dr. Sundaram, who is [c]laimant's family and treating physician," *see* Claimant's Brief at 4-5, claimant has failed to identify any errors made by the administrative law judge in the evaluation of the evidence and applicable law pursuant to 20 C.F.R. §§725.310, 718.202, 718.204 (2000). While the United States Court of Appeals for the Sixth Circuit has held in *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16, 24 (6th Cir. 1993), that the opinions of treating physicians are entitled to greater weight than opinions of non-treating physicians, the administrative law judge is not required to credit a treating physician's opinion if he finds that the opinion is not well reasoned. *See generally Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995).[6] Moreover, we need not address claimant's general contention that Dr. Sundaram's opinion establishes pneumoconiosis, as it is not sufficiently briefed. *Cox*, *supra*;

[6] The administrative law judge discounted Dr. Sundaram's opinion under Section 718.202(a)(4) (2000) because the administrative law judge found that Dr. Sundaram's statement that the effects of smoking dissipate after cessation of smoking was not credible given the general knowledge and evidence in the record that smoking can have long-term adverse effects. Decision and Order at 23.

Sarf, *supra*. Thus, the Board has no basis upon which to review the decision. Inasmuch as the administrative law judge properly considered the newly submitted evidence of record and determined that it failed to establish modification pursuant to Section 725.310 (2000), we affirm the administrative law judge's denial of benefits.[7] *Worrell*, *supra*.

[7] In addressing whether a change in conditions was established pursuant to 20 C.F.R. §725.310 (2000), the administrative law judge permissibly concluded that the newly submitted evidence of record failed to establish the existence of pneumoconiosis as the preponderance of the x-ray interpretations at 20 C.F.R. §718.202(a)(1) (2000) was found to be negative by readers with superior qualifications, there was no biopsy evidence of record, the presumptions at 20 C.F.R. §718.202(a)(3) (2000) were not applicable and the preponderance of the better reasoned newly submitted medical opinion evidence was negative for pneumoconiosis at 20 C.F.R. §718.202(a)(4) (2000). Decision and Order at 22-23; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986). The administrative law judge also rationally concluded that there was no mistake of fact in the prior decision and thus properly determined that claimant failed to establish modification. *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994); Decision and Order at 11-12.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge