BRB No. 02-484 BLA

OWEN C. BABB, Jr. (Deceased)	)	
Claimant-Petitioner	)	
v.	)	
PETER FORK MINING COMPANY	)	
and	)	
OLD REPUBLIC INSURANCE COMPANY	)	DATE ISSUED:_____
Employer/Carrier-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 Modification of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Charles B.W. Palmer and Calvin J. Laiche, Amite, Louisiana, for claimant.

Laura Metcoff Klauss (Greenberg Traurig LLP), Washington, D.C., for employer.

Helen H. Cox (Howard M. Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Modification (01-BLA-227) of Administrative Law Judge Clement J. Kennington rendered on claimant's request for modification 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 found that claimant failed to establish a material change in conditions or a mistake of fact regarding the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and 20 C.F.R. §724.310. Accordingly, he denied benefits.

Claimant, Owen C. Babb, Jr., worked as a surveyor in the military and as a civilian prior to engaging in coal mine employment for eight years from 1976 until 1984, at which time he retired. He filed a claim for benefits under the Act in 1992, which Administrative Law Judge Earl L. Thomas denied on the ground that claimant failed to establish the existence of pneumoconiosis. The administrative law judge found that the x-ray evidence failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), and that the medical opinion evidence failed to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(4). In reaching the latter conclusion, the administrative law judge gave diminished weight to Dr. Rasmussen's opinion that claimant suffered from pneumoconiosis because the administrative law judge determined that Dr. Rasmussen had underestimated claimant's smoking history. Accordingly, Administrative Law Judge Thomas denied benefits.

The Board subsequently denied claimant's appeal on the ground that substantial evidence supported the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). *Babb v. Peter Fork Mining Company*, BRB No. 95-1047 (May 22, 1996) (unpub.). The Board affirmed the administrative law judge's finding that the x-ray evidence failed to establish the existence of pneumoconiosis. With regard to the medical opinion evidence, the Board determined that the administrative law judge failed to determine the duration of claimant's smoking history and therefore erred in according Dr. Rasmussen's opinion less weight based on his lower estimate of claimant's smoking history. However, the Board found that the administrative law judge had permissibly relied on the more numerous well-reasoned and well-documented medical opinions of several other doctors, who found no evidence of pneumoconiosis. Because claimant failed to establish the existence of pneumoconiosis, the Board affirmed the administrative law judge's denial of

[1] The Department of Labor has amended the regulations implementing the Act. These regulations became 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.

benefits. *Babb, supra.* The Board also denied claimant's motion for reconsideration.

Claimant then filed a timely request for modification pursuant to 20 C.F.R. §725.310 (1996).[2] Following the subsequent denial of modification by the Office of Workers' Compensation Programs, claimant requested a hearing.[3] The parties agreed to forgo a formal hearing before the administrative law judge, but submitted exhibits, and claimant submitted a brief. Administrative Law Judge Kennington then issued his decision, finding that claimant had failed to establish either a mistake of material fact or a change in conditions pursuant to 20 C.F.R. §725.310 (2000).[4] Accordingly he denied benefits.

On appeal, claimant challenges several aspects of the administrative law judge's decision. Employer argues that the Decision and Order is supported by substantial evidence in the record and should be affirmed. The Director, Office of Workers' Compensation Programs filed a letter indicating that he would not participate in 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 Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant argues that the employer fraudulently informed its medical experts that claimant had a smoking history of one and one half to two packs a day for over forty years, when in fact claimant had smoked an average of one half to three quarters of a pack of cigarettes per day. Claimant also argues that employer's experts ignored claimant's exposure to coal mine dust in offering their opinions regarding the etiology of claimant's respiratory disease. Therefore, claimant argues that the administrative law judges erred in refusing to exclude those doctors' reports from the record. These contentions are without merit. As we stated in claimant's previous appeal to the Board, each of the physicians who evaluated claimant's medical records considered claimant's coal mine employment history. *Babb, supra*;

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[2] Although the record contains a document purporting to be claimant's appeal to the United States Court of Appeals for the Fifth Circuit, there is no indication elsewhere in the record that an appeal to that court was ever perfected. Director's Exhibit 63.

[3] Claimant died in 1999 at the age of 80, while his request for modification was pending before the Office of Workers' Compensation Programs. Thereafter, claimant's heirs pursued this action.

[4] As this claim was pending on January 19, 2001, the revised Section 725.310 regulation does not apply. *See* 20 C.F.R. §725.2 (2002).

Director's Exhibit 45. With regard to claimant's smoking history, Administrative Law Judge Kennington noted that Dr. Fino expressly testified that a lesser smoking history such as claimed by claimant would not alter his opinion that claimant's respiratory impairment was caused by cigarette smoking and not exposure to coal mine dust. Decision and Order at 15; *see* Employer's Exhibit 13 at 10, 19-20. The administrative law judge also relied upon the fact that Dr. Wiot's opinion was based on his x-ray interpretations and was not based upon any knowledge of claimant's smoking history. Decision and Order at 15. Moreover, the administrative law judge gave diminished weight to the opinion of Dr. Repsher in light of that physician's reliance on an inaccurate smoking history. *Id.* at 15, n.2. Thus, we find no error in the administrative law judge's treatment of the evidence relating to claimant's smoking and dust exposure history.

Claimant also suggests that the administrative law judge should have discarded Dr. Wiot's deposition since the administrative law judge questioned Dr. Wiot's statement that in close cases he always gave the benefit of the doubt to the patient in finding coal workers' pneumoconiosis. In response to Dr. Wiot's statement, the administrative law judge cited several decisions that referenced x-ray readings by Dr. Wiot finding no evidence of pneumoconiosis. *Id.* Thus, while he may have questioned Dr. Wiot's statement that he gave the benefit of the doubt to claimants, the administrative law judge was not required to give diminished weight to Dr. Wiot's entire deposition. *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989).

The remainder of claimant's argument consists of a request that this Board reweigh the medical opinion evidence. It is within the administrative law judge's discretion, as the trier-of-fact, to determine the weight and credibility to be accorded the medical experts, *see Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *Sisak v. Helen Mining Co*., 7 BLR 1-178, 1-181 (1984), and to determine whether an opinion is documented and reasoned, *see Clark v. Karst-Robbins Coal Co*., 12 BLR 1-149 (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). In the absence of any indication that the administrative law judge abused his discretion in evaluating the medical opinion evidence, we will not disturb the administrative law judge's findings.

For the forgoing reasons, we conclude that the administrative law judge's determination that the evidence failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) is supported by substantial evidence and in accord with the law, and we affirm it. *O'Keeffe, supra.* Inasmuch as claimant has failed to establish a change in conditions or a mistake of fact with regard to that element of his claim, we affirm the administrative law judge's denial of benefits.

Accordingly, the administrative law judge's Decision and Order Denying Modification is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge