BRB No. 07-0607 BLA

R. C. Claimant-Petitioner v. GILBERTON COAL COMPANY and LACKAWANNA CASUALTY COMPANY Employer/Carrier- Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 03/28/2008 DECISION and ORDER

Appeal of the Decision and Order-Denying Request for Modification and Denying Benefits of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

Barbara L. Feudale (Law Office of Barbara L. Feudale), Gordon, Pennsylvania, for claimant.

Maureen E. Herron, Wilkes-Barre, Pennsylvania, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order-Denying Request for Modification and Denying Benefits (06-BLA-5497) of Administrative Law Judge Paul H. Teitler rendered 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). This case involves

claimant's request for modification of the denial of a claim that was filed on May 13, 2002.[1] Director's Exhibit 2. The administrative law judge credited claimant with 11.09 years of coal mine employment.[2] Decision and Order at 3. Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718.

The administrative law judge found that the newly submitted evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), or that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore determined that claimant did not establish a change in conditions pursuant to 20 C.F.R. §725.310. The administrative law judge further found that a review of the entire record did not establish a mistake in a determination of fact in the prior denial of benefits pursuant to 20 C.F.R. §725.310. Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in his analysis of the new x-ray and medical opinion evidence when he found that the evidence did not establish the existence of pneumoconiosis and thus did not establish a change in conditions. Claimant further asserts that the administrative law judge erred in his analysis of the medical opinion evidence when he found that claimant did not establish that he is totally disabled. Additionally, claimant argues that the administrative law judge erred in his length of coal mine employment finding. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, declined to file a response brief in this appeal.[3]

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[1] Initially, Administrative Law Judge Janice K. Bullard denied the claim on July 26, 2004, based on claimant's failure to establish the existence of pneumoconiosis or a totally disabling respiratory impairment. Director's Exhibit 59. Pursuant to claimant's appeal, the Board affirmed the denial of benefits. [*R.C.*] *v. Gilberton Coal Co.*, BRB No. 04-0882 BLA (May 25, 2005)(unpub.); Director's Exhibit 64. Claimant requested modification of the denial of benefits on July 5, 2005, and submitted additional evidence. Director's Exhibits 65, 67.

[2] The record indicates that claimant's last coal mine employment occurred in Pennsylvania. Director's Exhibit 3. Accordingly, the Board will apply the law of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

[3] We affirm, as unchallenged on appeal, the administrative law judge's findings that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), (3). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-112 (1989).

Section 725.310 provides that modification may be granted on the grounds that a change in conditions has occurred or because a mistake in a determination of fact was made in the prior decision. 20 C.F.R. §725.310(a). The Board has held that in considering whether a claimant has established a change in conditions pursuant to 20 C.F.R. §725.310, the administrative law judge must assess the newly submitted evidence, in conjunction with the previously submitted evidence, to determine if the weight of the new evidence establishes at least one element of entitlement that defeated entitlement in the prior decision. If a change is established, the administrative law judge must then consider all of the evidence of record to determine whether claimant has established entitlement to benefits on the merits of the claim. *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993). Pursuant to a modification request, the administrative law judge has the authority to reconsider all the evidence for any mistake of fact. *Keating v. Director, OWCP*, 71 F.3d 1118, 1123, 20 BLR 2-53, 2-61-63 (3d Cir. 1995).

Claimant contends that the administrative law judge erred in finding that the new x-ray evidence was evenly balanced, and thus, did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). We disagree. The administrative law judge considered six readings of three new x-rays. The administrative law judge noted that Dr. Ciotola, a B reader and Board-certified radiologist, read the July 19, 2002 x-ray as negative for pneumoconiosis. Employer's Exhibit 1. The administrative law judge also noted that Dr. Smith, a B reader and Board-certified radiologist, read the June 16, 2005 x-ray as positive for pneumoconiosis, while Dr. Wheeler, a physician with identical radiological qualifications, read the same x-ray as negative for pneumoconiosis. Director's Exhibit 69; Employer's Exhibit 3. Finally, the administrative law judge noted that Dr. Smith, a B reader and Board-certified radiologist, read the January 11, 2006 x-ray as positive for pneumoconiosis, while Drs. Scott and Ciotola, physicians with identical radiological qualifications, read the same x-ray as negative for pneumoconiosis. Claimant's Exhibit 1; Employer's Exhibits 2, 5. The administrative law judge found that the x-ray readings, considered in light of the readers' qualifications, did not meet claimant's burden to establish the existence of pneumoconiosis:

> The record includes both positive and negative readings by physicians highly qualified as B-readers and board certified radiologists of the three newly submitted chest x-ray films dated July 19, 2002, June 16, 2005[,] and January 11, 2006. I note, however, these equally credible readings by the highly qualified physicians reach opposite results. I find, therefore, that the x-ray evidence is evenly balanced. Under such circumstances, when the evidence is evenly balanced, the benefits claimant must lose since he bears the burden of persuasion. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 11 S.Ct. 2251 (1994). Thus, I find Claimant has not established the presence of pneumoconiosis by the newly submitted x-ray reports of record under the provisions of subsection 718.202(a)(1).

Decision and Order at 4-5.

Claimant contends that the administrative law judge erred in finding the x-ray evidence to be in equipoise, and he argues that the administrative law judge should have "appl[ied] greater weight" to Dr. Smith's readings. Claimant's Brief at 5-6. The Board is not authorized to reweigh the evidence. *Anderson*, 12 BLR at 1-113. The administrative law judge properly considered the conflicting x-ray readings based on the readers' radiological qualifications, and substantial evidence supports his finding that the x-ray evidence did not establish the existence of pneumoconiosis. *See* 20 C.F.R. §718.202(a)(1); *White v. New White Coal Co.*, 23 BLR 1-1, 1-4-5 (2004). We therefore reject claimant's contention and affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(1).

Claimant contends that the administrative law judge erred in his analysis of the medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(4). Specifically, claimant argues that the administrative law judge erred in according greater weight to the opinions of Drs. Hertz and Dittman, than to the opinion of Dr. Kraynak, who is claimant's treating physician. Claimant's contention lacks merit.

In a report dated October 11, 2005, Dr. Kraynak, who is Board-eligible in Family Medicine, discussed medical and work histories, objective studies, and claimant's physical examination, and concluded that claimant has coal workers' pneumoconiosis. Director's Exhibit 71. Dr. Kraynak reiterated his opinion in his deposition, and stated that he has been treating claimant since 1994. Claimant's Exhibit 4. In a report dated January 26, 2006, Dr. Hertz, who is Board-certified in Internal Medicine and Pulmonary Disease, discussed his examination and testing of claimant, and opined that there was no evidence of coal workers' pneumoconiosis. Employer's Exhibit 5. Dr. Hertz reiterated his findings in his deposition. Employer's Exhibit 6. Dr. Dittman, who is Board-certified in Internal Medicine, discussed his examination and testing of claimant, reviewed the additional medical evidence submitted on modification, including the reports of Drs.

Kraynak and Hertz, and opined that claimant does not have coal worker's pneumoconiosis. Employer's Exhibit 7. Dr. Dittman reiterated his findings in his deposition. Employer's Exhibit 8.

The administrative law judge accorded greater weight to the opinions of Drs. Hertz and Dittman, which he found to be better reasoned and documented, than to Dr. Kraynak's diagnosis of pneumoconiosis. Contrary to claimant's contention, the administrative law judge considered Dr. Kraynak's status as claimant's treating physician,[4] but permissibly accorded greater weight to Dr. Dittman's opinion based on the physician's "more complete consideration of the medical evidence," and to Dr. Hertz's opinion based on his superior qualifications as a pulmonary specialist. Decision and Order at 6; *see* 20 C.F.R. §718.104(d)(5); *see Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986); *Hall v. Director, OWCP*, 8 BLR 1-193 (1985). Additionally, the administrative law judge acted within his discretion to find that Dr. Kraynak's opinion was not as thorough or as well-reasoned and supported as were the opinions of Drs. Dittman and Hertz. S*ee Kertesz*, 788 F.2d at 163, 9 BLR at 2-8; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987) We reject claimant's argument that the administrative law judge was required to accord greater weight to the opinion of Dr. Kraynak based on his status as claimant's treating physician. *See* 20 C.F.R. §718.104(d)(5). We affirm the administrative law judge's finding that the new medical opinion evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), as it is supported by substantial evidence.

Based on the foregoing, we affirm the administrative law judge's finding that claimant did not establish a change in conditions with respect to the existence of pneumoconiosis. *See* 20 C.F.R. §725.310. Further, claimant does not challenge the administrative law judge's additional finding that the entire record did not establish a mistake of fact in the determination that the existence of pneumoconiosis was not established. *Id*. The finding is therefore affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). As the administrative law judge properly found that claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a), an essential

[4] In so doing, the administrative law judge considered the factors listed in 20 C.F.R. §718.104(d) for assessing the opinion of a treating physician, specifically, the nature and duration of the treatment relationship, and the frequency and extent of treatment. 20 C.F.R. §718.104(d)(1)-(4); Decision and Order at 6-7. The administrative law judge found that the record did not establish "the nature of Dr. Kraynak's relationship with [c]laimant, the frequency of treatment[,] and the extent of treatment." Decision and Order at 7. Claimant has not challenged that factual determination. It is therefore affirmed. *Skrack*, 6 BLR at 1-711.

element of entitlement under Part 718, entitlement thereunder is precluded. *Anderson*, 12 BLR at 1-112. Therefore, we need not reach claimant's arguments regarding the administrative law judge's finding as to the length of coal mine employment, or the administrative law judge's finding that total disability was not established, as any error therein would be harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Accordingly, the administrative law judge's Decision and Order-Denying Request for Modification and 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