BRB No. 11-0457 BLA

WALTER F. SMITH	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PINE RIDGE COAL COMPANY	)	DATE ISSUED: 03/23/2012
	)	
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 on Modification of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith, Parkersburg, West Virginia, for claimant.

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

Before: SMITH, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits on Modification (2010-BLA-5498) of Administrative Law Judge Richard A. Morgan, rendered with respect to a subsequent claim, filed on February 2, 2007, pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act). The relevant procedural history is as follows. In a Decision and Order dated October 9, 2008, the administrative law judge accepted the parties' stipulation of at least sixteen years of coal mine employment and adjudicated the claim pursuant to the regulations at 20 C.F.R. Part 718. The administrative law judge determined that the newly submitted evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b) and, thus,

found that claimant demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309.[1] Director's Exhibit 48. However, in considering the claim on the merits, the administrative law judge found that claimant failed to establish the existence of clinical or legal pneumoconiosis[2] pursuant to 20 C.F.R. §718.202(a).[3] Accordingly, benefits were denied. *Id*. Claimant appealed, and the Board affirmed, the administrative law judge's credibility findings and the denial of benefits. *W.S.* [*Smith*] *v. Pine Ridge Coal Co.*, BRB No. 09-0127 BLA (Aug. 31, 2009) (unpub.).

[1] The administrative law judge noted that claimant filed a prior claim on March 30, 1994, which was denied by the district director, but that the file from the prior claim could not be located at the Federal Records Center. Director's Exhibit 48. Therefore, the administrative law judge assumed, for purposes of 20 C.F.R. §725.309, that none of the elements of entitlement was established in the prior claim. *Id*.

[2] "Clinical pneumoconiosis" consists of those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment. 20 C.F.R. §718.201(a)(1).

Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

[3] The administrative law judge determined that the x-ray evidence was in equipoise, that there was no biopsy evidence, and that claimant was not eligible for any of the presumptions available to establish the existence of pneumoconiosis. 2008 Decision and Order at 15-16; *see* 20 C.F.R. §718.202(a)-(3). The administrative law judge also rejected Dr. Rasmussen's opinion, that claimant has clinical pneumoconiosis, because he found that it was merely a restatement of a positive x-ray reading, and further found that Dr. Rasmussen did not provide a reasoned and documented opinion as to the existence of legal pneumoconiosis. 2008 Decision and Order at 16 In contrast, the administrative law judge credited, as reasoned and documented, the opinions of Drs. Zaldivar and Rosenberg that claimant did not have legal pneumoconiosis. *Id*.; *see* 20 C.F.R. §718.202(a)(4).

Claimant subsequently filed a request for modification on September 15, 2009. In his Decision and Order Denying Benefits on Modification, dated March 11, 2011, the administrative law judge found, pursuant to 20 C.F.R. §725.310, that there was no mistake in a determination of fact with respect to the prior denial of benefits, and that the new evidence submitted on modification did not establish a change in conditions. The administrative law judge also found that, while claimant was entitled to a presumption of total disability due to pneumoconiosis, pursuant to amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4),[4] employer successfully rebutted that presumption because the evidence showed that claimant does not have pneumoconiosis and that his respiratory disability did not arise out, or in connection with, coal mine employment. Therefore, the administrative law judge denied claimant's request for modification, pursuant to 20 C.F.R. §725.310, and denied benefits.

On appeal, claimant contends that the administrative law judge did not apply the proper legal standard in weighing the evidence relevant to the issues of the existence of pneumoconiosis and rebuttal of the amended Section 411(c)(4) presumption. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response to claimant's appeal, unless specifically requested to do so by the Board.

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.[5] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §922, which is incorporated into the Act by 30 U.S.C. §932(a), and implemented by 20

[4] On March 23, 2010, amendments to the Act, which affect claims filed after January 1, 2005 that were pending on or after March 23, 2010, were enacted. *See* Section 1556 of the Patient Protection and Affordable Care Act, Public Law No. 111-148 (2010). The amendments revive Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4).

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because claimant's coal mine employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4.

C.F.R. §725.310, authorizes modification of an award or denial of benefits, based on a change in conditions or a mistake in a determination of fact. In considering whether a change in conditions has been established, an administrative law judge is obligated to perform an independent assessment of the newly submitted evidence, 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 that defeated entitlement in the prior decision. *See 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). Mistakes of fact may be demonstrated by wholly new evidence, cumulative evidence, or merely upon further reflection on the evidence of record. *See O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971); *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993).

I. Findings of the Administrative Law Judge

In considering whether claimant established a basis for modification pursuant to 20 C.F.R. §725.310, the administrative law judge found that there was no mistake in a determination of fact with regard to the prior denial of benefits. As to the issue of whether claimant established a change in conditions, the administrative law judge weighed the new x-ray readings submitted by the parties in support of modification, with the previously submitted x-ray evidence at 20 C.F.R. §718.202(a)(1). The administrative law judge determined that the record, overall, consists of fourteen readings of five x-rays.[6] Decision and Order Denying Benefits on Modification at 5-6, 16-17. In weighing the conflicting readings, the administrative law judge gave controlling weight to the readings by the dually-qualified Board-certified radiologists and B readers. *Id*. at 16. Relying on the qualifications of the radiologists, the administrative law judge found that a

[6] A May 9, 2007 x-ray was read for quality purposes by Dr. Gaziano, as positive for pneumoconiosis by both Dr. Rasmussen, a B reader, and Dr. Miller, a dually-qualified Board-certified radiologist and B reader, but as negative by Dr. Wheeler, also a dually-qualified radiologist. Director's Exhibits 12, 13, 14. A July 18, 2007 x-ray was read as positive for pneumoconiosis by Dr. Ahmed, a dually-qualified radiologist, but as negative by both Dr. Zaldivar, a B-reader, and Dr. Scatarige, a dually-qualified radiologist. Director's Exhibits 15, 16, 35. A March 4, 2008 x-ray was read as positive by Dr. Ahmed and by Dr. Pathak, a dually-qualified radiologist, but as negative by Dr. Scatarige and by Dr. Scott, also a dually-qualified radiologist. Director's Exhibits 35, 41. A September 21, 2009 x-ray was read as positive by Dr. Ahmed, but as negative by Dr. Wheeler. Director's Exhibits 59, 62. Finally, an October 20, 2010 x-ray was read as negative by Dr. Wheeler. Employer's Exhibit 1.

May 9, 2007 x-ray was positive for pneumoconiosis, that x-rays dated March 4, 2008 and September 21, 2009 were in equipoise and that x-rays dated July 18, 2007 and October 2010 x-rays were negative for pneumoconiosis. *Id*. at 16-17. The administrative law judge concluded that, "claimant cannot establish the existence of pneumoconiosis by a preponderance of the [x]-ray evidence." *Id*. at 17.

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge reweighed the three medical opinions of record, by Drs. Rasmussen, Rosenberg and Zaldivar,[7] relevant to whether claimant has legal pneumoconiosis. Decision and Order Denying Benefits on Modification at 17. The administrative law judge noted that all of the physicians agreed that claimant suffers from a disabling respiratory condition, in the form of chronic obstructive pulmonary disease (COPD), but they disagreed as to the cause of this condition. *Id*. He specifically found that Dr. Rasmussen attributed claimant's COPD to a combination of smoking and coal dust exposure, while Drs. Zaldivar and Rosenberg opined that claimant's respiratory condition is due entirely to smoking. *Id*.

In weighing the conflicting medical opinions, the administrative law judge gave little weight to Dr. Rasmussen's opinion because "his statements regarding the effects of smoking and coal mine dust exposure appear to be more general rather than related to the specific facts of this case." Decision and Order Denying Benefits on Modification at 18. In contrast, the administrative law judge found that Dr. Rosenberg persuasively "discussed how the objective tests in this case produced results that distinguish the claimant's smoke-related illness from a coal dust-related disease." *Id*. Specifically, the administrative law judge noted that Dr. Rosenberg explained how claimant's "[FEV1]/FVC ratio and low diffusing capacity in the pulmonary function studies were typical of the results of smokers he treats as part of his practice." *Id*. He was also persuaded by Dr. Rosenberg's discussion of "how smoking causes focal emphysema, whereas coal dust exposure causes more diffuse emphysema." *Id*. The administrative law judge further found that Dr. Rosenberg persuasively explained why "bullous emphysema is generally unrelated to coal dust exposure unless there is progressive massive fibrosis, which is not present in this case."[8] *Id*. Thus, the administrative law judge gave controlling weight to Dr. Rosenberg's opinion, that claimant does not have legal pneumoconiosis, at 20 C.F.R. §718.202(a)(4), and found that claimant failed to

[7] Claimant did not submit any additional medical opinion evidence to support his modification request. Employer submitted deposition testimony from Drs. Zaldivar and Rosenberg.

[8] Additionally, the administrative law judge determined that Dr. Rosenberg was more qualified than Dr. Rasmussen. Decision and Order Denying Benefits on Modification at 17-18.

demonstrate a basis for modification by establishing a change in conditions at 20 C.F.R. §725.310. *Id*.

However, the administrative law judge found that claimant invoked the presumption of total disability due to pneumoconiosis, pursuant to amended Section 411(c)(4), because he has at least fifteen years of qualifying coal mine employment and is totally disabled by a respiratory or pulmonary impairment. In considering whether employer established rebuttal of the presumption, the administrative law judge reiterated his finding that "claimant does not suffer from clinical or legal pneumoconiosis." Decision and Order Denying Benefits on Modification at 22. The administrative law judge further concluded that the opinions of Drs. Rosenberg and Zaldivar "rule out" coal dust exposure as a cause of the claimant's lung disease. *Id.* The administrative law judge, therefore, found that employer "successfully rebutted the presumption that the claimant is totally disabled due to pneumoconiosis." *Id*.

II. Arguments on Appeal

Claimant resurrects, in this appeal, the same argument he made in the prior appeal, that the administrative law judge applied the wrong legal standard by first rendering a determination, under each subsection at 20 C.F.R. §718.202(a)(1)-(4), as to whether the evidence supported a finding of pneumoconiosis, rather than simply weighing all of the evidence together. Claimant's Petition for Review (unpaginated) at [7], *citing Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-175 (4th Cir. 2000). However, as we previously explained in *Smith*, BRB No. 09-0127 BLA, slip op. at 5, the administrative law judge's analysis is not contrary to *Compton*, and we reject claimant's argument in this appeal for the reasons stated in that decision. *Id.*; s*ee Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990).

With regard to the issue of rebuttal of the amended Section 411(c)(4) presumption, because claimant does not identify any specific error with regard to the manner in which the administrative law judge weighed the x-ray evidence, we affirm the administrative law judge's finding that employer successfully proved that claimant does not have clinical pneumoconiosis by x-ray. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983): Decision and Order Denying Benefits on Modification at 22. As to the issue of whether employer disproved the existence of legal pneumoconiosis, we reject claimant's argument that the administrative law judge erred in finding Dr. Rosenberg's opinion to be reasoned and documented and entitled to controlling weight.

We reject claimant's contention that the administrative law judge erred in crediting Dr. Rosenberg's opinion, insofar as Dr. Rosenberg cited to negative x-ray evidence as support for his finding that claimant does not have pneumoconiosis. *See* Claimant's Brief at [8]; *Thorn v. Itmann Coal Co.*, 3 F.3d 713, 718, 18 BLR 2-16, 2-25

(4th Cir. 1993). The Board has already affirmed the administrative law judge's determination that Dr. Rosenberg's opinion is reasoned and documented because he rationally explained that "while miners can develop significant COPD from coal mine dust exposure, the specific pattern of the objective evidence in this case indicated that claimant's pulmonary condition is due solely to his 'long and significant smoking history.'" *See Smith,* BRB No. 09-0127, slip op. at 3, *quoting* Director's Exhibit 11 at 7. We see no error in the administrative law judge's reliance on Dr. Rosenberg's opinion in considering claimant's modification request. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997).

Although claimant generally asserts that Dr. Rasmussen's opinion is the only reasoned medical opinion of record, this argument amounts to a request that the Board reweigh the evidence, which we are not empowered to do. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because the administrative law judge permissibly exercised his discretion in reaching his credibility determinations, we affirm his finding, based on Dr. Rosenberg's opinion, that claimant does not have legal pneumoconiosis.[9] *See Hicks*, 138 F.3d at 528, 21 BLR at 2-326; *Akers*, 131 F.3d at 441, 21 BLR at 2-275; Decision and Order Denying Benefits on Modification at 18, 22. Consequently, we affirm, as supported by substantial evidence, the administrative law judge's determination that employer rebutted the presumption at amended Section 411(c)(4) by proving that claimant does not have pneumoconiosis. We, therefore, affirm the administrative law judge's finding that claimant did not establish a basis for modification at 20 C.F.R. §725.310 and further affirm the denial of benefits.

[9] The administrative law judge indicated that Dr. Zaldivar's opinion also supported Dr. Rosenberg's opinion. Decision and Order Denying Benefits on Modification at 18.

Accordingly, the Decision and Order Denying Benefits on Modification of the administrative law judge is affirmed.

SO ORDERED.

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

_____
JUDITH S. BOGGS
Administrative Appeals Judge