BRB No. 13-0278 BLA

MICHAEL L. BELLITTS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
JEDDO HIGHLAND COAL COMPANY	)	
	)	
and	)	
	)	
LACKAWANNA CASUALTY COMPANY	)	DATE ISSUED: 03/11/2014
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Lystra A. Harris, Administrative Law Judge, United States Department of Labor.

Helen M. Koschoff, Wilburton, Pennsylvania, for claimant.

Judd Woytek (Marshall, Dennehey, Warner, Coleman & Goggin), for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (11-BLA-6140) of Administrative Law Judge Lystra A. Harris denying claimant's request to modify the denial of benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case, involving a subsequent claim filed on June 22, 2001,[1] has a lengthy procedural history.[2]

In a Decision and Order on Remand dated June 13, 2007,[3] Administrative Law Judge Janice K. Bullard found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a).[4] Accordingly, Judge Bullard denied benefits.

Pursuant to claimant's appeal, the Board affirmed Judge Bullard's finding that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). *Bellitts v. Jeddo Highland Coal Co.*, BRB No. 07-0818 BLA (July 30, 2008 (unpub.). The Board, therefore, affirmed Judge Bullard's denial of benefits. *Id.*

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[1] Claimant filed a claim with the Social Security Administration (SSA) on October 20, 1971. Director's Exhibit 1. The SSA denied benefits on November 16, 1971, September 12, 1973, September 7, 1978, and March 6, 1979. *Id.* The Department of Labor denied benefits on May 21, 1980. *Id.* Claimant filed a second claim on February 19, 1991. Director's Exhibit 1. The district director denied the claim because claimant failed to establish any of the elements of entitlement. *Id.* At claimant's request, the case was forwarded to the Office of Administrative Law Judges for a formal hearing. However, when claimant failed to attend the scheduled hearing, Administrative Law Judge Robert D. Kaplan ordered claimant to show cause within fifteen days why his claim should not be dismissed. After receiving no response from claimant, Judge Kaplan, by Order dated February 12, 1992, dismissed claimant's 1991 claim. 20 C.F.R. §§725.465, 725.466.

[2] The 2010 amendments to the Act, which became effective on March 23, 2010, do not apply to this case, since it involves a miner's claim filed before January 1, 2005.

[3] For a complete procedural history of this case, *see Bellitts v. Jeddo Highland Coal Co.*, BRB No. 05-0872 BLA (Aug. 15, 2006) (unpub.).

[4] Administrative Law Judge Janice K. Bullard noted that the Board had previously affirmed her finding that the newly submitted evidence established total disability pursuant to 20 C.F.R. §718.204(b), thereby establishing a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Decision and Order on Remand at 6 n.5.

Claimant timely filed a request for modification on November 10, 2008. Director's Exhibit 134. In a Decision and Order issued on May 20, 2010, Administrative Law Judge Adele Higgins Odegard found that the newly submitted evidence (*i.e.*, the evidence submitted subsequent to Judge Bullard's 2007 Decision and Order on Remand) did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and was, therefore, insufficient to establish a change in conditions pursuant to 20 C.F.R. §725.310. Judge Odegard also found that there was not a mistake in a determination of fact pursuant to 20 C.F.R. §725.310. Accordingly, Judge Odegard denied benefits.

While claimant's appeal was pending before the Board, claimant filed a motion to remand, informing the Board that he was pursuing a second request for modification. In response, the Board dismissed claimant's appeal and remanded the case for modification proceedings. *Bellitts v. Jeddo-Highland Coal Co.*, BRB No. 10-0526 BLA (Sept. 24, 2010) (Order) (unpub.).

In a Decision and Order dated April 1, 2013, Administrative Law Judge Lystra A. Harris (the administrative law judge) found that claimant failed to establish either a change in conditions or a mistake in a determination of fact 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 finding that claimant did not establish either a change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310. Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

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

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any

[5] The record indicates that claimant's coal mine employment was in Pennsylvania. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

one 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).

The Board has held that in considering whether a claimant has established a change in conditions at 20 C.F.R. §725.310, an administrative law judge is obligated to perform an independent assessment of the new 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. *Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-6, 1-11 (1994); *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).

In her 2010 Decision and Order denying benefits, Judge Odegard found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Consequently, the relevant issue before the administrative law judge was whether the new evidence (*i.e.*, the evidence submitted subsequent to Judge Odegard's 2010 Decision and Order) was sufficient to establish a change in conditions pursuant to 20 C.F.R. §725.310. *Kingery*, 19 BLR at 1-11; *Nataloni*, 17 BLR at 1-84; *Kovac*, 14 BLR at 1-158.

Claimant argues that the administrative law judge erred in finding that the newly submitted evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4) and, therefore, erred in finding that claimant failed to establish a change in conditions pursuant to 20 C.F.R. §725.310. Claimant initially contends that the administrative law judge erred in finding that the newly submitted x-ray evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). The administrative law judge considered two interpretations of an x-ray taken on April 4, 2011.

While Dr. Smith, a B reader and Board-certified radiologist, interpreted the April 4, 2011 x-ray as positive for pneumoconiosis, Claimant's Exhibit 4, Dr. Wheeler, an equally qualified physician, interpreted this x-ray as negative for the disease. Employer's Exhibit 2. Because equally qualified physicians disagreed as to whether the April 4, 2011 x-ray established the existence of pneumoconiosis, the administrative law judge permissibly found their readings were "in equipoise," and that, therefore, the April 4, 2011 x-ray did not support a finding of pneumoconiosis. *See Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984); Decision and Order at 13-14. In this case, the administrative law judge properly considered the number of x-ray interpretations, along with the readers' qualifications, the dates of the x-ray, and the actual readings. *See Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); *see also Wheatley v. Peabody Coal Co.*, 6 BLR 1-1214 (1984); *see generally Gober v. Reading Anthracite Co.*, 12 BLR 1-67 (1988). Because it is supported by

substantial evidence, we affirm the administrative law judge's finding that the newly submitted x-ray evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).[6]

Claimant next contends that the administrative law judge erred in finding that the newly submitted medical opinion evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). A finding of either clinical pneumoconiosis, *see* 20 C.F.R. §718.201(a)(1), or legal pneumoconiosis, *see* 20 C.F.R. §718.201(a)(2),[7] is sufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge considered the newly submitted medical reports of Drs. Kraynak and Levinson. Although Dr. Kraynak diagnosed clinical pneumoconiosis, the administrative law judge permissibly found that the x-ray that Dr. Kraynak relied upon as positive for pneumoconiosis was inconclusive for the existence of the disease,[8] thus calling into question the reliability of Dr. Kraynak's diagnosis of clinical pneumoconiosis. *See Arnoni v. Director, OWCP*, 6 BLR 1-423 (1983); Decision and Order at 15; Claimant's Exhibit 5. Because Dr. Levinson did not diagnose clinical pneumoconiosis, we affirm the administrative law judge's finding that the newly submitted medical opinion evidence did not establish the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

[6] Because claimant does not challenge the administrative law judge's findings that the newly submitted evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202)(a)(2), (3), these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[7] "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 to that deposition caused by dust exposure in 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." 20 C.F.R. §718.201(a)(2).

[8] Dr. Kraynak based his diagnosis of coal workers' pneumoconiosis on Dr. Smith's positive interpretation of the April 4, 2011. Claimant's Exhibit 5. However, as previously discussed, the administrative law judge permissibly found that the April 4, 2011 x-ray was "in equipose" in regard to the presence of pneumoconiosis. Decision and Order at 13-14; *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 281, 18 BLR 2A-1, 2A-12 (1994).

Claimant next argues that the administrative law judge erred in finding that Dr. Kraynak's opinion did not establish the existence of legal pneumoconiosis. We disagree. Dr. Kraynak opined that claimant suffers from legal pneumoconiosis, in the form of a chronic pulmonary condition due to coal mine dust exposure. Claimant's Exhibit 5. The administrative law judge, however, found that Dr. Kraynak failed to adequately explain his basis for attributing claimant's "chronic pulmonary condition" to his coal mine dust exposure. The administrative law judge, therefore, acted within her discretion in finding that Dr. Kraynak's opinion was not sufficiently reasoned.[9] *See Consolidation Coal Co. v. Kramer*, 305 F.3d 203, 211, 22 BLR 2-467, 2-481 (3d Cir. 2002); *Kertesz v. Director, OWCP*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986). Because Dr. Levinson did not diagnose legal pneumoconiosis,[10] we affirm the administrative law judge's finding that the newly submitted medical opinion evidence did not establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). In light of our affirmance of the administrative law judge's findings that the newly submitted evidence did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(4), we affirm her finding that claimant failed to establish a change in conditions pursuant to 20 C.F.R. §725.310.

Claimant also contends that the administrative law judge, in finding that claimant failed to establish a mistake in determination of fact, "failed to provide a sufficiently detailed review of the evidence." Claimant's Brief at 9. We disagree. Based upon a "review of the prior decision" and the "newly and previously submitted evidence," the administrative law judge found that there was not a mistake in a determination of fact regarding the previous determination that the evidence did not establish the existence of pneumoconiosis. *See* Decision and Order at 17. Upon review, substantial evidence supports the administrative law judge's finding. Consequently, we affirm the administrative law judge's finding that there was not a mistake in a determination of fact

[9] Claimant argues that the administrative law judge failed to properly consider Dr. Kraynak's status as claimant's treating physician. Contrary to claimant's argument, while a treating physician's opinion may be due additional deference, there is no *per se* rule that a treating physician's opinion must always be accorded the greatest weight. *See Soubik v. Director, OWCP*, 366 F.3d 226, 236, 23 BLR 2-82, 2-101 (3d Cir. 2004). Here, the administrative law judge properly considered Dr. Kraynak's status as claimant's treating physician pursuant to the factors set forth at 20 C.F.R. §718.104(d), but permissibly found his opinion was not sufficiently reasoned to establish legal pneumoconiosis. Decision and Order at 15-16; 20 C.F.R. §718.104(d); *see Kertesz v. Director, OWCP*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986).

[10] Dr. Levinson opined that claimant did not suffer from any pulmonary impairment due to coal mine dust exposure. Employer's Exhibit 4.

pursuant to 20 C.F.R. §725.310. We, therefore, affirm the administrative law judge's denial of claimant's request for modification.

Accordingly, the administrative law judge's Decision and Order 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