BRB No. 06-0601 BLA

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| ELDON K. NEWPORT | ) | |
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| Claimant-Petitioner | ) | |
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| v. | ) | |
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| SAM DAUGHERTY/DAUGHERTY TRUCKING COMPANY | ) | DATE ISSUED: 05/25/2007 |
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| and | ) | |
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| UNITED STATES FIDELITY & GUARANTY | ) | |
| | ) | |
| Employer/Carrier-Respondents | ) | |
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| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| | ) | |
| Party-in-Interest | ) | DECISION and ORDER |

Appeal of the Decision and Order on Remand-Denial of Modification of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

Eldon K. Newport, Caryville, Tennessee, *pro se*.

Herbert B. Williams (Stokes, Rutherford, Williams, Sharp & Davies, PLLC), Knoxville, Tennessee, for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel,[1] appeals the Decision and Order on Remand-Denial of Modification (02-BLA-0400) of Administrative Law Judge Richard T. Stansell-Gamm (the administrative law judge) 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 has a lengthy procedural history.[2] When the case was most recently before the Board, the Board vacated the administrative law judge's finding that clinical and legal pneumoconiosis were established pursuant to 20 C.F.R. §718.202(a)(4) on the basis of the new medical opinion evidence, and his finding that a change in conditions pursuant to 20 C.F.R. §725.310 (2000) was, therefore, established. The Board agreed with assertions made by employer and the Director, Office of Workers' Compensation Programs (the Director), that the administrative law erred in evaluating the medical opinion evidence on the issue of clinical and legal pneumoconiosis. In light of that error, the Board vacated the administrative law judge's finding of pneumoconiosis at Section 718.202(a)(4) and his finding that a change in conditions was established at Section 725.310 (2000), and remanded the case for further consideration thereunder. The Board also vacated the administrative law judge's award of benefits on the merits and instructed the administrative law judge to reconsider the merits of the case, if reached. *Newport v. Sam Daugherty/Daugherty Trucking Co.*, BRB No. 04-0467 BLA (May 26, 2005)(unpub.).

On remand, the administrative law judge found that the medical opinion evidence did not establish the presence of clinical or legal pneumoconiosis, and that claimant had failed, therefore, to establish either a change in conditions subsequent to the prior denial of benefits or that a mistake in a determination of fact had been made in the prior

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[1] Ron Carson, a benefits counselor with Stone Mountain Health Services, filed an appeal on behalf of claimant, but is not representing him on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, BRB No. 94-3940 BLA (May 19, 1995) (Order).

[2] The long procedural history of this claim, which was filed in October 1990, is detailed in the Board's prior decision in *Newport v. Sam Daugherty/Daugherty Trucking Co.*, BRB No. 04-0467 BLA (May 26, 2005) (unpub.) and the administrative law judge's April 8, 2004 decision. The claim was initially denied in 1994 because claimant failed to establish the existence of pneumoconiosis. The claim was then subject to numerous requests for modification and appeals to the Board. Ultimately, Administrative Law Judge Richard T. Stansell-Gamm granted claimant's request for modification, 20 C.F.R. §725.310 (2000), because he found the existence of pneumoconiosis established at 20 C.F.R. §718.202(a)(4). Benefits were, accordingly, awarded. Employer appealed the award of benefits on modification and on May 26, 2005 the Board vacated the award on modification and remanded the case for further consideration of the issue of pneumoconiosis.

decision denying benefits. Accordingly, the administrative law judge denied claimant's request for modification and denied benefits.

On appeal, claimant generally asserts that he is entitled to benefits. Employer responds, urging that the denial of benefits be affirmed. The Director has not filed a brief in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised on appeal to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law. 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).

After consideration of the administrative law judge's decision and the evidence of record, we conclude that the administrative law judge's decision is rational, supported by substantial evidence and in accord with law. Because claimant failed to establish the existence of either clinical or legal pneumoconiosis,[3] claimant has failed to establish a basis for modifying the prior denial of his claim, and we must, therefore, affirm the denial of benefits.

Regarding the medical opinions relevant to the issue of clinical pneumoconiosis, the administrative law judge accorded little weight to the opinions of Drs Baker and Sullivan, diagnosing clinical pneumoconiosis, because they relied on x-rays that were consistent with pneumoconiosis, which were at odds with the administrative law judge's own finding concerning the x-ray evidence, and they did not cite to any other medical evidence which supported their findings of clinical pneumoconiosis. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Fuller v. Gibraltar Coal Co.*, 6 BLR 1-1291 (1984). In contrast, the administrative law judge rationally found Dr. Fino's opinion that claimant did not have clinical pneumoconiosis to be the

[3] "Clinical" pneumoconiosis consists of those diseases recognized by the medical community as pneumoconiosis and includes, but is not limited to coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis and silicotuberculosis. 20 C.F.R. §718.201(a)(1).

"Legal" pneumoconiosis is "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 lung disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

most probative on the issue as it was most consistent with the underlying documentation of record, including the x-ray evidence. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); *Peskie.*, 8 BLR 1-126; *Lucostic*, 8 BLR 1-46.[4]

The administrative law judge further noted that, even if he had found Dr. Sullivan's opinion to be reasoned, he would have found that "the seemingly varying nature of [Dr. Sullivan's] coal workers' pneumoconiosis diagnosis interjects sufficient equivocation to diminish its probative value."[5] Decision and Order on Remand at 17; *see Griffith v. Director, OWCP*, 49 F.3d 184, 186, 19 BLR 2-111, 2-117 (6th Cir. 1995); *see Justice v. Island Creek Coal Co.*, 11 BLR 1-191 (1988); *Revnack v. Director, OWCP*, 7 BLR 1-771 (1985). Accordingly, we affirm the administrative law judge's finding that the medical opinion evidence does not establish the existence of clinical pneumoconiosis.[6]

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[4] In addition, the administrative law judge rationally gave little weight to the opinion of Dr. Narula because he found the physician's opinion to be equivocal and tentative since she never, in her multiple treatment notes concerning claimant's pulmonary complaints, diagnosed coal workers' pneumoconiosis. *See Griffith v. Director, OWCP*, 49 F.3d 184, 186, 19 BLR 2-111, 2-117 (6th Cir. 1995); *see Justice v. Island Creek Coal Co.*, 11 BLR 1-191 (1988); *Revnack v. Director, OWCP*, 7 BLR 1-771 (1985). The administrative law judge also rationally found that Dr. Wheeler's findings regarding the existence of coal workers' pneumoconiosis were not as well-documented as the opinions of the other doctors because Dr. Wheeler's finding, that claimant did not suffer from coal workers' pneumoconiosis, was based on x-ray and CT-scan evidence, but not pulmonary function studies and physical examination results. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*).

[5] The administrative law judge observed that Dr. Sullivan, who first saw claimant in March of 1997, did not make a diagnosis of coal workers' pneumoconiosis until February, 1998. The administrative law judge further observed that, although Dr. Sullivan became more certain of his view about black lung disease by 2001 and 2002, he diagnosed only chronic bronchitis and emphysema, with no mention of coal workers' pneumoconiosis, in his last three treatment notes of record dated May 13, 2002, August 27, 2002, and February 3, 2003. *See* Decision and Order on Remand at 17.

[6] Addressing the medical opinion evidence relevant to the existence of clinical and legal pneumoconiosis, the administrative law judge found Drs. Baker, Sullivan, and Fino to be on "essentially equal footing." Decision and Order on Remand at 15. The administrative law judge noted that Drs. Baker and Sullivan, as claimant's treating physicians, had developed an extensive understanding of claimant's pulmonary condition through their periodic and long term doctor-patient contact with claimant. The administrative law judge also found, however, that Dr. Fino had reviewed the office and

In addressing the opinions of Drs. Baker and Sullivan on the issue of legal pneumoconiosis,[7] the administrative law judge accorded them diminished weight, because, while the doctors attributed claimant's obstructive impairment to his long-term coal dust exposure,[8] they did not explain how the coal dust exposure actually caused or significantly aggravated claimant's emphysema. The administrative law judge found the opinions of those physicians to be conclusory because they "failed to provide[] any explanation or rationale on how they were able to distinguish the unique cases of [claimant's] pulmonary impairment that set his case apart from the etiology of emphysema in the lungs of a prior heavy cigarette smoker who never stepped into a coal mine." Decision and Order on Remand at 17. The administrative law judge, therefore, permissibly found the opinions of Drs. Baker and Sullivan to be poorly reasoned and entitled to less weight, based on the failure of the physicians to explain their conclusions. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-623 (6th Cir. 2003); *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 22 BLR 2-495 (6th Cir. 2002).

In contrast, the administrative law judge found that Dr. Fino explained why claimant's coal dust exposure played no role in his pulmonary impairment. The

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treatment notes of both of these physicians, and had therefore indirectly obtained the documentary advantage associated with the physicians' care of claimant. The administrative law judge concluded, therefore, that while Dr. Fino was not a treating physician, he may have had the best documentary basis for his conclusions due to his comprehensive review of claimant's entire medical record. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-623 (6th Cir. 2003).

[7] Dr. Baker found that claimant's obstructive airway disease was due to coal dust exposure. Director's Exhibit 181; Claimant's Exhibits 6, 14. Dr. Sullivan opined that one cause of claimant's severe obstructive airway disease was coal dust exposure. Director's Exhibit 181; Claimant's Exhibit 13. Dr. Fino found that claimant did not suffer from an occupationally acquired pulmonary condition. Director's Exhibit 187; Employer's Exhibits 2, 4. Dr. Narula stated that claimant's coal mine employment "may have very well contributed to his underlying lung disease." Claimant's Exhibit 11. After reviewing x-ray and CT scan evidence, Dr. Wheeler found no evidence of pneumoconiosis and stated that the conditions seen on claimant's x-rays were not caused by coal dust exposure. Employer's Exhibits 3, 1 at 8, 10, 24.

[8] Drs. Baker and Sullivan, highlighting claimant's twenty-five pack-year smoking habit and twenty-eight years of coal dust exposure, stated that the results of the objective testing and clinical findings established the presence of a chronic obstructive pulmonary impairment. *See* Decision and Order on Remand at 17.

administrative law judge noted that Dr. Fino reached his finding based on his examination, in detail, of both the nature and extent of any connection between claimant's coal mine employment and his pulmonary impairment. Accordingly, the administrative law judge permissibly accorded superior weight to the opinion of Dr. Fino as the best reasoned of the newly submitted medical opinions pertaining to the issue of legal pneumoconiosis. *See Williams*, 338 F.3d at 513, 22 BLR at 2-647; *Stephens*, 298 F.3d at 520, 22 BLR at 2-509; *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *see also Cornett*, 227 F.3d at 575, 22 BLR at 1-120. Accordingly, we affirm the administrative law judge's finding that the medical opinion evidence did not establish the existence of legal pneumoconiosis.

The administrative law judge rationally concluded that pneumoconiosis was not established at Section 718.202(a)(4) and that claimant had, therefore failed to establish a change in conditions or that a mistake in a determination of fact had been made in the prior denial of benefits, based on his consideration of the evidence of record. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993). We thus affirm the administrative law judge's denial of modification. *See Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994).

Accordingly, the administrative law judge's Decision and Order on Remand-Denial of Modification 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